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Sending the Bureaucracy to War

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I. INTRODUCTION

The war against terrorism is transforming our bureaucracy, and it is transforming it badly. Since September 11, the government has mobilized not just its national security apparatus, but almost all of the myriad units of the federal civil administrative state to battle against a small and elusive foe.[1] Officials like state department of motor vehicles ("DMV") employees and federal banking regulators have no obvious expertise in counterterrorism. Nevertheless, in DMVs, the Treasury Department, and many other unlikely venues, all of the usual indicators of bureaucratic action—rulemakings, adjudications, licensing, and civil enforcement actions—have been put to the new and uneasy service of national security. In this Article, we argue that the vast majority of these civil bureaucratic initiatives in the war against terrorism suffer from predictable, persistent, and probably intractable problems.

Everyone agrees that we should fight terrorism. The question is how we should do it—and who we should use for the job. While the debate over the war on terrorism thus far has focused on questions of civil liberties and executive authority, other fundamental questions have been overlooked. For example, do our civil administrative agencies make effective, efficient foot soldiers in this war? Or, in transforming our bureaucracy to become a fighting unit, are we undermining its ability to serve the vital, if more prosaic, purposes for which it was intended?

A sober reevaluation of the costs and benefits of the approach the government has taken since September 11 is overdue, particularly in light of the all-encompassing nature of the administrative anti-terrorism campaign. Almost every federal department and agency has adopted an anti-terrorism policy or initiative. The most mundane of state and local agencies have been asked to transform themselves into security providers and law enforcers.

Pursuant to the USA PATRIOT Act of 2001 ("PATRIOT Act"),[2] passed shortly after September 11 and recently reauthorized, financial regulators in the Department of the Treasury have passed rules, engaged in enforcement actions, and taken over American organizations in an effort to disrupt terrorist financing.[3] Pursuant to the REAL ID Act of 2005,[4] immigration

1. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 710 (2004) (observing that "Al Qaeda knows no borders, and its operatives wear no uniforms, operating by stealth more often than they operate openly"); *see also* CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION, at x (2002) (defining terrorism like that practiced by al Qaeda as "emerging through non-national, global networks and with aspirations which are likewise distanced from place and time").

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

3. *See infra* Part IV (discussing the PATRIOT Act and the financial war on terror).

adjudicators have been given broad, barely reviewable discretion to make asylum determinations with an eye to keeping terrorists out of the United States, and state DMVs have been tasked with new responsibilities for limiting access to drivers' licenses.[5]

In this Article, we survey some of the bureaucratic initiatives taken on the authority of these two statutes and identify three characteristic problems with these efforts.[6] These problems test the capacity of the administrative state, and in doing so, tell us something about how that state works, especially its efficacy in the context of unconventional, new initiatives.

First, we identify the problem of fit, that is, the problem of using civil rules to find and deter terrorists—perhaps the quintessential non-civil actors. Administrative agencies tend to make law in one of two ways: by creating and enforcing rules of general applicability that govern the public at large, such as through a tax collection or drivers' licensing regime, or by extending a benefit in exchange for voluntary cooperation, such as granting licenses to financial institutions in return for voluntary compliance with reporting requirements.[7] These typical modes of action are ill suited to reach terrorists, who can opt out of regimes that depend on voluntary participation and who comprise a tiny segment of the public as a whole.[8] These problems of scale and coverage make the efforts to detect and deter terrorists very different from customary bureaucratic work. We argue that, as a result, bureaucracy is almost always unfit to do counterterrorism.[9]

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4. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (to be codified in scattered sections of Titles 8 and 49 of the U.S.C.).

5. *See infra* Part III (discussing the REAL ID Act).

6. In doing so, we study three traditional forms of administration. But perhaps because of the difficulties of employing traditional administrative procedure to combat terrorism, new methods of administration have also been employed: networks of domestic and foreign officials to harmonize and coordinate law-enforcement approaches and privatization of enforcement—mobilizing banks for asset freezes and monitoring. Indeed, as Anne-Marie Slaughter has noted, networks might be one of the more effective ways to determine "how to mesh antiterrorism legislation to minimize loopholes" in a multilateral world. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 208 (2004). Accordingly, Part IV.B examines a more networked mechanism of administration—one that trades on the gathering and exchange of information.

7. James Landis himself noted that the New Deal agencies he helped to design and justify were focused on "a general social and economic problem which cut across a vast number of businesses and occupations." JAMES LANDIS, THE ADMINISTRATIVE PROCESS 116 (1938). And contemporary observers continue to agree: "Government mandates and rulemaking generally apply across the board to individuals and businesses within broad categories." THE BUSINESS ROUNDTABLE, TERRORISM: REAL THREATS. REAL COSTS. JOINT SOLUTIONS 24 (2003), *available at* http://www.abanet.org/adminlaw/conference/2003/NewFrontier/BusRoundtable_cba.pdf; *cf.* 1 MAX WEBER, ECONOMY & SOCIETY 212 (Guenther Roth & Claus Wittich eds., Bedminster Press 1968) (1944) ("[E]very genuine form of domination implies a minimum of voluntary compliance . . . .").

8. *See* WEBER, *supra* note 7, at 212.

9. Nor are problems of fit exclusive to the United States. *See, e.g.*, Lorne Sossen, *The Intersection of Administrative Law with the Anti-Terrorism Bill*, *in* THE SECURITY OF FREEDOM 419–34

Second, these anti-terrorist measures diminish administrative effectiveness by going to extraordinary lengths to privilege agency discretion, thereby reducing agency accountability and, predictably, resulting in increasingly arbitrary and unreviewable agency action. We call this the problem of overdiscretion. It is a maxim of administrative law that the authority delegated to administrative agencies should be paired with safeguards on the abuse of that authority.[10] Accordingly, administrative agencies have traditionally operated publicly and openly and usually pursuant to a tested and established framework of rules.[11] Agency rulemaking is governed by requirements for public notice and comment,[12] while agency adjudication is subject to judicial review or, at a minimum, to supervision by senior executive branch officials.[13] But the administrative initiatives against terror routinely reduce what have traditionally been

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(R. Daniels et al. eds., 2001) (discussing the relationship between anti-terrorism initiatives and administrative law in Canada).

10. *See* Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1679–81 (1979). In responding to the Administrative Procedure Act,

> [Courts have] turned to a number of . . . techniques to control the exercise of administrative discretion [including] by undertaking a more searching scrutiny of the substantiality of the evidence supporting agency factfinding and by insisting on a wider range of procedural safeguards, . . . require[ing] reasoned consistency in agency decisionmaking, . . . [and] demand[ing] a clear statement of legislative purpose as a means of restraining the range of agency choice when fundamental individual liberties were at risk.

Id. (internal citations omitted); *see also generally* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE §§ 4.5, 7.7, 8.5 (3d ed. 1994) (noting the courts' curtailing of administrative power and strengthening of evidentiary requirements for administrative investigation).

11. *See, e.g.*, Eyal Benvenisiti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 LAW & CONTEMP. PROBS. 319, 319 (2005); Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 376 (2001) ("The last great movement in U.S. administrative law was toward increased transparency and participation in government decisionmaking as a means of achieving a more perfect pluralist democracy."); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 91 (1983) ("Transparency is usually bought at the price of incongruity or *ex ante* rulemaking costs."); *see also* Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933, 1000 (2004) ("Indeed, agencies already seek to improve the objectivity of their analyses by providing rigid ex ante rules for measuring costs and benefits."). As one author has noted:

> [D]elegation of authority endows administrative agents with wide discretion, discretion that breeds concerns of unaccountability, recklessness, and corruption. Administrative law is designed to address such concerns by curbing agents' discretion through the structuring of the decisionmaking process, by providing procedural transparency and voice to affected groups, and by setting up review mechanisms including judicial review.

Benvenisiti, *supra*, at 319.

12. *See* 5 U.S.C. § 553 (2000).

13. *Id.* § 554.

participatory, reviewable rulemaking or adjudicatory processes to singular acts of discretion that are often undertaken in secret and are thus effectively insulated from public view and from judicial, or even supervisory, review. Furthermore, these measures often place this decision-making authority in the hands of mid-level or even street-level bureaucrats, such as office directors in the Department of the Treasury in the case of the terrorist financing programs, or low-level state employees in the case of the drivers' license programs created by the REAL ID Act.[14] The allocation of discretion to bureaucrats who are all but insulated from oversight has, at least in the case of anti-terrorism regulation, become a license for arbitrariness.

Third, anti-terrorism regulation has expanded agency powers to regulate beyond areas of agency expertise. Since September 11, our bureaucracy has folded new industries into its regulatory purview and has adopted new investigative and rulemaking responsibilities—responsibilities that are often difficult to distinguish from criminal law enforcement. Max Weber posited that bureaucracies would develop rational and task-specific areas of expertise.[15] But the new anti-terrorism responsibilities of agencies have ignored this Weberian maxim. Instead, agencies have been tasked with uncharacteristic, non-civil responsibilities and have been told to exercise these responsibilities without supervision. The results have been predictably inexpert.

As a result of the problems of fit, overdiscretion, and inexpertise, agencies asked to fight the war on terror consistently miss their targets. In fact, the fit between bureaucratic methods of regulation and terrorist patterns of behavior is so poor that civil bureaucrats typically do not even try to target terrorists directly. Instead, they target proxy groups in the hopes that somewhere among those proxies, terrorists may be found. The predictable result has been that these initiatives have burdened proxy groups, not terrorists. This proxy problem, as we call it, means that the administrative war on terror overwhelmingly burdens law abiders who willingly participate in civil administrative schemes.[16]

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14. We borrow the term "street-level bureaucrats" from MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980), a landmark study evaluating the policymaking done by the lowest-level government employees, such as the police or social workers.

15. WEBER, *supra* note 7, at 17–21 (setting forth the principles of "legal authority with a bureaucratic staff," which resulted in, inter alia, the "rule bound conduct of official business," "specialized training" for government employees, and a "specialized sphere of competence" for administrators).

16. Of course, it may be that Americans are willing to accept certain levels or types of false positives—for example, Americans may feel it is worth over-restricting immigration from countries likely to produce terrorists. But in our efficiency- and effectiveness-oriented analysis of the bureaucratic war against terror, we find that the level of false positives in these systems is quite high indeed and that the cost of adapting task-specific civil administration to deal with terrorists is accordingly much larger than it might, at first blush, seem to be.

In this Article, we first look at classical and modern theories of the purpose of administrative law and consider what they have to tell us about the administrative war on terror. As a matter of scholarship, we think that the currently ascendant focus on the political choices made by agencies and by those who delegate authority to them overlooks vital questions of competence that occupied scholars like Weber and the mid-century legal process theorists. The conceptualization of administrative law as a political arena fails to provide us with traction on important questions like whether administrative law is an appropriate way to pursue counterterrorism.

Because the competence theorists understood that the justification for administrative action depends on a careful analysis of its prospects for success, we offer a relatively thick description[17] of four characteristic initiatives authorized by the PATRIOT and REAL ID Acts that exemplify the project of sending bureaucrats to war. We analyze the costs and benefits of the mobilization of the broad panoply of administrative process pursuant to both statutes—rulemakings, enforcement actions, adjudications, and licensing—to show how the three paradigmatic problems of fit, overdiscretion, and inexpertise characterize the efforts of the DMVs, the Citizenship and Immigration branch of the Department of Homeland Security, and the Treasury Department to implement their new mandates.[18] We then consider some possible counterarguments to our thesis: that agencies are flexible institutions that have promulgated rules that might do some good, that terrorism is a fearsome prospect worth overrreaction, and that perhaps the overbreadth of anti-terrorism regulations usefully mobilize the citizenry. We find these counterarguments wanting.

We conclude with a brief survey of some of the many other initiatives that agencies have taken since September 11 to prosecute the war on terror to give readers a sense of the breadth of the phenomenon. And finally, we offer recommendations about the appropriate place to locate administrative counterterrorism initiatives.[19]

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17. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURE 1 (1973). Geertz posits that

> [b]ehavior must be attended to, and with some exactness, because it is through the flow of behavior—or, more precisely, social action—that cultural forms find articulation. They find it as well of course, in various sorts of artifacts, and various states of consciousness; but these draw their meaning from the role they play (Wittgenstein would say their "use") in an ongoing pattern of life, not from any intrinsic relationships they bear to one another.

Id.

18. Because some of these problems are more significant in certain examples than in others, and because in each example they interrelate to some degree, we have taken a content-driven approach to organizing our discussion within these Parts. Each Part is structured to focus on the most relevant issues and to maximize the logical flow of the argument. Accordingly, the order in which we discuss the issues varies from Part to Part.

19. *See infra* Part VI.

Ordinary civil agencies are simply not very effective at fighting terrorism. Accordingly, combating terrorism should very rarely be the principal justification for a new administrative initiative, although it is possible that some narrow terrorism-directed rules—locking cockpit doors, for example—will make sense. The better course for regulators and lawmakers, however, is not to look first to a proposed rule's purported effect on terrorism, but to ask whether the rule promotes an end that furthers the agency's regulatory responsibilities.[20] If so—if anti-terrorism benefits are incidental—then the rule may be justified, and the problems we have identified may be avoided. But if not, then the repurposing of a civil agency to wage war on terror should be viewed skeptically. In the future, we hope that congressional oversight committees and senior executive officials will take the problems of administration seriously before ordering civil agencies to take on uncomfortable and novel roles as soldiers of counterterrorism.

II. THEORIES OF ADMINISTRATIVE LAW AND THE WAR ON TERROR

Our critique draws upon the work of classical theorists of administrative law, such as Max Weber and Henry Hart, as well as more contemporary commentators such as Colin Diver, who have identified the characteristics that enable agencies to function effectively: expertise and discretion bounded by oversight. What these observers understood, and what has been obscured by the rush to send civil agencies to war, is that a judgment about the legitimacy of agency action should be bounded not only by questions of political oversight and delegation, transparency, and democratic accountability, but also by a thick view of how agencies actually function, of their capabilities, and of their structure. In this, our focus is primarily on the period and process of implementation rather than on the moment or process of delegation; that is, we assert that a crucial test of agency legitimacy is agency effectiveness. We stand with Alexander Hamilton, who posited more than two hundred years ago that "the true test of a good government is its aptitude and tendency to produce a good administration."[21]

Our case studies also stand as a counterpoint, and perhaps even a challenge, to much of the leading work justifying delegation to agencies, which tends to focus on political control, rather than capacity, as the

20. In their study of the political development of the Department of Homeland Security ("DHS"), Dara Kay Cohen and her co-authors similarly conclude that shifting agencies to the DHS has come at a cost to what they refer to as the agencies' "legacy mandates" and what we call their "core missions." They conclude, in fact, that this reduction in agency capacity to pursue their legacy mandates is not merely an unfortunate result of, but a key purpose of, executive decisions to refocus agency efforts on the war on terror. Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 724 (2006).

21. THE FEDERALIST NO. 68, at 44 (Alexander Hamilton) (Modern Library 1941).

fundamental test of the legitimacy of agency action. Our survey of this literature thus posits that there has been a transformation from theories of administration that have based the legitimacy of agencies on their capacity and expertise to an approach that rests legitimacy on the political process of agency control. In the scholarship on the administration of the war on terror, this has meant that most observers have been thinking about divided government control of the war-fighting executive rather than about the capabilities of the various independent and executive branch agencies in helping to fight that war.

A. *EXPERTISE AND DISCRETION IN CLASSICAL THEORY*

Classical theorists of public administration evaluated its merit based on its capacity. Although we admit that legal scholars should tread carefully when invoking ten-dollar sociologists, we suggest Max Weber as an early example. Weber, although principally a describer rather than a defender of modern bureaucratic process, praised the agency as a mechanism for adopting rationalized, task-specific, expert, and depersonalized approaches to modern problems and for depoliticizing the task of regulation: "The needs of mass administration make it today completely indispensable. The choice is only between bureaucracy and dilettantism in the field of administration."[22] The legal process school that played such an important role in mid-century administrative law accepted and built upon the Weberian notion of bureaucratic expertise by focusing its attention on the competencies and division of authority between courts and agencies.[23] In this vein, James Landis argued that the purpose of agencies was to provide expert supervision of the complicated problems and externalities presented by the modern economy.[24]

Expertise alone neither described nor justified the administrative state, however. Weber and the legal process scholars who followed him also emphasized the importance of organizational charts and the balance between discretion and oversight that they signified. To Weber, bureaucracies characteristically featured systems of supervision and

22. WEBER, *supra* note 7, at 223. As Wolfgang Mommsen has explained, in Weber's view, "[r]ational, consistent, bureaucratic rule based on a division of labor and strictly defined areas of responsibility was a more effective means of government than all historically successful forms of the exercise of power," though, of course, Weber was not always sure that this was such a good thing. WOLFGANG J. MOMMSEN, MAX WEBER AND GERMAN POLITICS 166 (Michael S. Steinberg trans., 1984).

23. Timothy Stoltzfus Jost, *Health Law and Administrative Law: A Marriage Most Convenient*, 49 ST. LOUIS U. L.J. 1, 16–17 (2004) (citing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, INTRODUCTION TO HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, lx–lxii (1994); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 577–79 (1992)).

24. LANDIS, *supra* note 7, at 19.

subordination, and few modern administrative scholars would disagree.[25] He stressed that government functions could only be coordinated and rationalized on the basis of regular recording and review of decisions and rules.[26] As Dan Tarlock has said: "The great project of modern administrative law has been to cabin the exercise of agency discretion."[27] Legal process theorists took a similar view of the importance of organization. In this vein, Henry Hart declared that "each agency of decision ought to make those decisions which its position in the institutional structure best fits it to make."[28]

In the United States, judges have provided much of this supervision. In fact, the study of judicial review of discretionary decisions by agencies is at the very center of administrative law and has occupied scholars since passage of the Administrative Procedure Act shortly after World War II.[29] The prerogative of supervision is also one the courts themselves have jealously guarded.[30]

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25. WEBER, *supra* note 7, at 217, 221. Weber wrote:

> [T]he typical person in authority, the "superior," is himself subject to an impersonal order by orienting his actions to it in his own dispositions and commands. . . . [T]he person who obeys authority does so, as it is usually stated, only in his capacity as a "member" of the organization and what he obeys only the law.

Id. at 217. Weber also noted that the bureaucrat is "subject to strict and systematic discipline and control in the conduct of the office." *Id.* at 221; *see also* Robert A. Kagan, *Inside Administrative Law*, 84 COLUM. L. REV. 816, 816 (1984) (noting that many scholars believe that "only in the corridors and cubicles of the bureaucracy itself, properly organized and managed, can images of bureaucratic injustice be replaced by administrative adjudication that will produce a sense of "satisfaction, acceptance, and justice" (quoting JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 15 (1983))).

26. WEBER, *supra* note 7, at 219. Weber wrote:

> Administrative acts, decisions, and rules are formulated and recorded in writing, even in cases where oral discussion is the rule or is even mandatory. . . . The combination of written documents and a continuous operation by officials constitutes the "office" (bureau) which is the central focus of all types of modern organized action.

Id.

27. A. Dan Tarlock, *A First Look at a Modern Legal Regime for a "Post-Modern" United States Army Corps of Engineers*, 52 U. KAN. L. REV. 1285, 1313 (2004); *see also* Terrence Daintith, *Contractual Discretion and Administrative Discretion: A Unified Analysis*, 68 MOD. L. REV. 554, 576 (2005) (providing a theoretical justification for constraining agencies as a matter of contract).

28. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 426 (1958).

29. Not every theorist agrees, of course. Edward Rubin's new work on Weber rejects a hierarchical model of the administrative state and posits a more networked approach to bureaucratic linkage. *See generally* EDWARD L. RUBIN, BEYOND CAMELOT (2006).

30. Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 751–65 (1992) (noting that courts have a strong presumption in favor of reviewability); *see also* Stephen I. Vladeck, *The Increasingly Unflagging*

To the New Dealers, court supervision was never meant to be absolute, but nor was it meant to be perfunctory. Thurman Arnold's preference for granting agencies relatively unbounded discretion to act in lieu of courts as task-specific doers of equity[31] was rejected by Felix Frankfurter and other early New Deal scholars, who urged an important role for courts, one that allocated oversight authority between courts and agencies on the basis of institutional competence.[32]

To be sure, these organizers of authority between courts and agencies found, as Colin Diver has suggested, that institutional competence may be a "terribly plastic," and thus all too malleable concept.[33] Nonetheless, to Diver and others, it remains "the only material we have" to make sense of the proper roles of agencies in the government.[34]

Two of the three problems that we think are inherent in sending the bureaucracy to war—overdiscretion and inexpertise—are accordingly ones that administrative lawyers will find familiar. By commandeering civil agencies to pursue terrorists, our government has pushed agencies outside their Weberian mandate to be rationalized, expert, and ordered. In offering national security to serve as an unreviewable trump card unfettering agency discretion, our government has undermined the capability-based relationship between oversight and discretion that these theorists thought was important.[35]

Our claim about fit—which turns on the generality of civil administration—has not been applied to cases like this one, though we think it is related to Weber's view that organization would mark much of modern

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Obligation: Federal Jurisdiction After Saudi Basil *and* Anna Nicole, 42 TULSA L. REV. (forthcoming 2007) (arguing that recent Supreme Court jurisprudence has encouraged the exercise of federal jurisdiction and carefully policed congressional attempts to limit that jurisdiction).

31. Arnold rejected any fundamental or functional distinctions between the judiciary and agencies as institutions of governance except insofar as they served the symbolic dimensions of governance. He also showed little faith in process as a necessary and sufficient means to a functional administrative state. Rather, he saw procedural doctrines in the same way that a wily, creative attorney does: as a tool to move a decisionmaker to a desired outcome. Process, form, and structure were secondary to substantive policy and functional results. Mark Fenster, *The Birth of A "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 73 (2005).

32. *Id.* at 124–27. James Landis, for example, argued that "the advantages of specialization in the field of regulatory activity seem obvious enough" and that "the need for expertness became dominant." LANDIS, *supra* note 7, at 23.

33. Colin S. Diver, *Sound Governance and Sound Law*, 89 MICH. L. REV. 1436, 1449 (1991) (reviewing CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990)) (concluding that institutional competence is a particularly appropriate lens to use when evaluating the choice to regulate through courts or agencies).

34. *Id.*; *see also* Jerry Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 405 (1996)

35. Of course, this is not the first time that Congress and the executive have toyed with the balance of administrative agency expertise, oversight, and discretion in ways that make administrative law scholars gnash their teeth. *See, e.g.*, Mashaw, *supra* note 34, at 405.

life. To us, and perhaps to him, civil administration is best suited to deal with the everyday workings of civil society rather than with the extraordinary acts of small and shadowy criminal enterprises.

B. THE TURN TOWARDS POLITICS AND AWAY FROM CAPACITY

Recently, administrative law academics have not focused on the classic questions of efficiency and effectiveness in implementation. Rather, their work has privileged an earlier moment in agency action—the moment of delegation—and has focused on the question of political interests. While these are important questions, in our view this movement in the scholarship has had two problematic effects, at least in the context of national security: it has tended to ignore the agency's implementation of its delegated authority and so has tended to distract scholars from the search for *good*—as opposed to democratically justifiable—administration.

This shift in perspective might best be exemplified by Richard Stewart's 1975 article on the transformation of administrative law since the New Deal.[36] Stewart showed how the New Deal revolutionized the purview of agencies by basing their legitimacy on their role as expert, task-specific regulators—a role that Weber and the legal process theorists understood.[37] But the expertise justification, Stewart argued, had given way to a much more political conception of an agency's role and to a corresponding judicial view of agency process as one designed to represent the varied interests involved in any form of agency interaction.[38]

Since Stewart, the politicized concept of agency action has informed the leading scholarly reconceptions of administrative law. As a result, political theorists have focused their attention primarily on the moment of delegation and on the battle amongst competing political interests for the power to define agency goals. Theorists do not agree about where these competing interests resolve their disputes: the positive political theorists would probably point to Congress,[39] while the presidentialists would look to the presidency,[40] and others concerned with the increasing prominence of

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36. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

37. *See id.* at 1671–76 (discussing the traditional role of administrative agencies)

38. *Id.* at 1760–89

39. Positive political theorists, for example, have conceptualized the chief ways that Congress might supervise agencies in two ways: through "police patrol" and "fire alarm" oversight. Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 43 (1994) ("Positive political theory describes regulatory policymaking as a part of a world in which political actors function within institutions rationally and strategically in order to accomplish certain goals."); *see also* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984).

40. *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003) ("[T]he White House clearly has used rulemaking review to put its own mark on particular agency rules increasingly often over the course of the past two

privatized alternatives to traditional regulation might point to non-regulatory actors.[41] Stewart himself has been particularly, but not exclusively, concerned with judicial review.[42]

Positive political theorists (mostly, but not entirely, political scientists) have focused their attention on congressional control of agencies and have addressed the competence of agencies to act by considering how Congress would oversee their actions.[43] Presidentialists, on the other hand, have cited the political choices that agencies make with the president and have characterized agency action as subject to strong presidential control.[44] Still others have sought to make agencies themselves the center of political disputes by privatizing the interest group representation process, either through negotiated regulation[45] or by opening up traditional areas of administration to contract and bidding by private parties.[46] Stewart himself

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decades, and at an accelerated pace during the Clinton administration."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) ("[A]t different times, one [governmental entity] or another has come to the fore and asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process. In this time, that institution is the Presidency. We live today in an era of presidential administration.").

41. *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997) (promoting negotiated regulation as a collaborative process producing better outcomes than rulemaking); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 31–42 (1982).

42. *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 439–44 (2003) (evaluating administrative law through five different historical approaches, comparing those approaches to current practice, and noting that each approach takes a different perspective towards judicial review).

43. For an overview by an administrative scholar, see generally Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994). McCubbins and his co-authors, as well as those who have followed them, have tended to conclude that congressional supervision of agencies is relatively effective. Indeed, they have argued that administrative procedure, by requiring a certain level of disclosure of agencies, was enacted by a rational Congress concerned with ensuring the efficacy of fire-alarm-style oversight:

> Fire alarm oversight also requires that elected officials, once the fire alarm has sounded, investigate conflicting claims among constituent groups and an agency. To undertake this function, elected officials must have ready access to relevant information. . . . . The APA helps to ensure that this information is provided through the openness provisions and the requirement that agencies allow affected parties to participate.

McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 199 (1990).

44. Croley, *supra* note 40, at 883; Kagan, *supra* note 40, at 2246.

45. *See, e.g.*, Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1457 (1997). Jody Freeman, *supra* note 41, at 7, was another recent exponent of "regneg," although Richard Stewart long ago considered the promise of the concept. *See* Richard B. Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1341 (1981).

46. *See* Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003). *See generally* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) (noting the trend toward privatization in recent decades).

has suggested that he now prefers market-oriented solutions to regulatory problems.[47]

In our view, this debate addresses only one of the questions that need be asked when it comes to understanding and critiquing the delegation of authority to carry out vast counterterrorism agendas to unrelated federal agencies. While the question of the representation of executive, congressional, and public interests in the war on terror is important, an equally important question is not what power is delegated to the agencies, nor how that power is delegated, but whether the agencies are an appropriate receptacle for that power. The debate that has dominated attempts to define administrative law for the past thirty years does not offer enough traction on that question.

Furthermore, in each of these theories of the administrative state, the act of administration is conceived descriptively only in a thin way, as a purely political act. The interest group representation model of agencies viewed them as task-specific political actors, whose work could be justified only through the participation of the plurality of interests affected by the charge given to agencies.[48]

To really understand and justify agency tasks, one cannot only focus on the political aspect of who decides.[49] Discretion is not only a grant of political power but also a claim to organized competence. Accordingly, it is crucial to consider whether specific agencies can and do exercise their discretion successfully to produce competent results.[50] Similarly, we should look at agency capabilities and expertise not merely as an expression of the competing interests of the represented public, but also as a function of efficiency and effectiveness.

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47. Stewart, *supra* note 42, at 451 ("Economic incentives are a logical next step . . . . Rather than using economic tools to discipline command regulators, [they] eliminate[ ] command regulation and use[ ] economic instruments to reconstitute the market itself for regulatory ends.").

48. *See, e.g., id.* at 442 (noting that by the 1970s, "courts required agencies to address and respond to the factual, analytical, and policy submissions made by the various participating interests and justify their policy decisions with detailed reasons supported by the rulemaking record," resulting in "an 'interest representation' model that seeks to assure an informed, reasoned exercise of agency discretion that is responsive to the concerns of all affected interests").

49. *See* Ronald Krotozynski, *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 739 (2002) (identifying problems with the "theory of implied delegation, rather than agency expertise, as the foundation of this rule of deference" that marks modern judicial supervision over agency decisionmaking).

50. As Jerry Mashaw has explained, "[f]rom the perspective of bureaucratic rationality"—a perspective that we largely adopt—"administrative justice is accurate decisionmaking carried on through processes appropriately rationalized to take account of costs." MASHAW, *supra* note 25, at 26.

C. WAR ON TERROR SCHOLARSHIP: THE PRIVILEGING OF POLITICS AND RIGHTS

American legal scholarship on the war on terror since September 11 has focused primarily on the appropriate authority and roles of the executive, legislature, and judiciary, rather than on the agencies that make up our so-called fourth branch. Many scholars have grappled with the scope of executive power.[51] Other writers have expressed concerns about post-September 11 intrusions on civil liberties[52] and explored the effect of the de facto post-September 11 state of emergency on criminal procedure rights.[53]

This focus on unbridled executive power has found a response in Cass Sunstein's proposal that the most deferential doctrine of administrative law be used to bridle the executive—at least a little. In *Administrative Law Goes to War*, Sunstein asserts that "the logic of *Chevron* applies to the exercise of executive authority in the midst of war" and that principles of administrative law can help our governing institutions divide the powers to make war.[54] Thus, Sunstein is engaged in a different inquiry than ours: he is focusing on the military war in Iraq and the President's powers to make it, whereas here we confront the question of how our government will use its bureaucracy to the end of fighting the far more loosely defined and potentially interminable war on terror.[55]

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51. As in, for example, Kim Lane Scheppele's critique of "ever-expanding" exceptionalism, justifying executive overreaching during a time of perceived national emergency. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1003 (2004). Rosa Brooks made a related indictment of unbounded executive claims to emergency powers as claims of "war everywhere," even, we assume, in the traditional administrative state. Brooks, *supra* note 1, at 704.

52. *See generally* DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002).

53. *See* John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=806384; Scheppele, *supra* note 51, at 1052 ("There is also a sign that terrorism investigations have been increasingly using methods that no longer require regular Fourth Amendment judicial warrants."); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2142–60 (2002).

54. Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2264 (2005). Sunstein is concerned specifically with certain non-delegation questions raised by Jack Goldsmith and Curtis Bradley in their recent article on the constitutional- and international-law bases of the war against terrorism. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV 2047 (2005). In their article, Bradley and Goldsmith argue that "[a]lthough nondelegation concerns should not play a significant role in interpreting the AUMF, a clear statement requirement is appropriate when the President takes actions under the AUMF that restrict the liberty of non-combatants in the United States." *Id.* at 2047.

55. Nonetheless, this paper suggests that civil-administration and war-making powers co-exist uneasily at best. We should be cautious, then, in assuming that the *Chevron* framework is the right one to use in analyzing war-making authority. Although Sunstein supposes that "[i]n war no less than peace, the inquiry into presidential authority can be organized and disciplined if it is undertaken with close reference to standard principles of administrative law," it is by no means clear that the rules of bureaucracy will be well-suited to decisions prompted by needs of

Similarly, some of those who have weighed in on the role of the judiciary in the war on terror have tackled the relationship between courts and executive agencies, while others have theorized about the appropriate role for courts in terror regulation through tort.[56] In the administrative context, some of our colleagues have focused on particular problems that various agencies have faced when tasked with terror-fighting responsibilities, ranging from agency-by-agency critiques to broader concerns about subverting principles of open governance.[57] Finally, some of our colleagues have applied theories of bureaucratic structure to the political process by which the Department of Homeland Security was created, critiquing the effects of this massive administrative reorganization.[58]

But these task- and issue-specific critiques address parts of the elephant. The broader question—the one addressed in this Article—is *how* the government should be mobilized to fight terrorism. Currently, it is a multi-front effort, including prosecutors, spies, and soldiers. We ask whether civil bureaucrats should be added to the list of fighters, not as a matter of individual rights or government powers, but as a matter of *capabilities.* Although these other questions are important, they can be answered only with an understanding of what the civil bureaucracy is actually capable of performing. We consider how the civil administrative state has performed in the war on terror in the next two Sections by examining how administrators have implemented two important statutes passed after September 11.

III. THE REAL ID ACT: ANTI-TERRORISM THROUGH ADJUDICATION

In May 2005, Congress passed the REAL ID Act,[59] legislation intended to "prevent another September 11-type terrorist attack by disrupting terrorist travel."[60] Here, we focus on the two central aspects of the REAL ID Act that

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security, as the sorts of regulation that bureaucratic rules try to do are a bit different. Sunstein, *supra* note 54, at 2672.

56. *See generally* Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061 (2005); John C. Yoo, *Judicial Review and the War on Terrorism*, 71 GEO. WASH. L. REV. (forthcoming 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=461721. While tort suits by victims constitute a form of regulation, they are outside the scope of this paper, which focuses on the repurposing of agencies, rather than courts, and on government-initiated, rather than privately initiated, regulation. *See, e.g.*, Jack Landman Goldsmith III & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM (John Norton Moore ed., 2004).

57. Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 164 (2004) (post-September 11 "closure [of deportation proceedings] represents an instance in which the government wielded significant power over a deportee's life under conditions of secrecy"); David A. Schulz, *How the Government's Response to 9/11 May Close the Doors to Open Government*, 20 COMM. LAW. 3, 3 (2003).

58. *See generally* Cohen et al., *supra* note 20.

59. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

60. Press Release, U.S. House of Representatives Committee on the Judiciary, Sensenbrenner House Floor Statement on REAL ID Legislation (Feb. 9, 2005), *available at*

seek to implement anti-terrorist measures through the machinery of the administrative state: the new role imposed on state Department of Motor Vehicles ("DMVs") in issuing drivers' licenses and the increased discretion given to the U.S. Citizenship and Immigration Service ("USCIS") to turn away applicants for political asylum.[61]

These new roles embody the problems of fit, overdiscretion, and inexpertise discussed above and thus threaten to produce all the inefficiencies and irrationalities decried by Weber and the legal process theorists. In enacting this legislation, Congress has enlisted two agencies that serve wide swaths of the public to seek out a handful of terrorists. It has enrolled an agency with a very narrow expertise (the DMV) to conduct far more sweeping tasks, and it has engaged an agency that has proved itself inept in applying its ostensible expertise (the USCIS) to act with greater discretion than ever before. In this sense, the REAL ID Act seems to be an expression of unfettered optimism that agencies that have never before exhibited the capability or judgment to carry out complex, sensitive tasks will nonetheless now rise to the challenge. But from a more sober perspective, these measures seem at best misguided, at worst counterproductive, and, in any event, counter to basic principles of agency law.

A. *STATE DMVS AND DRIVERS' LICENSING*

A state DMV may be one of the very few administrative agencies that virtually every American visits at least once or twice in their lives. According to a 2002 national survey, ninety-five percent of Americans have a driver's license, and the other five percent have an alternative DMV-issued ID.[62] In addition to its primary purpose of authorizing driving privileges, the driver's license has become the most common form of identification, whether for buying cigarettes or alcohol, cashing a check, or, of course, boarding a plane. For many Americans, the driver's license is their only government-issued form of picture ID, making it the most important document in their possession, the one that enables them to go about every aspect of their daily lives.

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http://judiciary.house.gov/newscenter.aspx?A=433 (noting Rep. Sensenbrenner's sponsorship of the bill); *see also* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005); 151 CONG. REC. E225 (2005) (legislative history).

61. REAL ID Act tits. I & II. Other provisions concern border security, REAL ID Act § 102, tit. III, and visas for H2-B temporary workers, nurses, and Australian nationals, REAL ID Act tits. IV & V.

62. AM. ASS'N OF MOTOR VEHICLE ADM'RS, NATIONAL SURVEY (2002), *available at* http://www.aamva.org (search "02192"; then follow hyperlink).

1. The New Regulatory Scheme

With the REAL ID Act's drivers' license mandates, Congress targeted agencies whose reform would palpably affect virtually every person in the United States. Thus, it is the problem of fit that looms largest here, followed by the problems of inexpertise and overdiscretion. The REAL ID Act directs states to adopt three major groups of changes in issuing driver's licenses:

(1) *New features of the driver's license card itself*, including display of identifying information, such as the person's full legal name and a digital photo; "common machine readable technology"; and "[p]hysical security features designed to prevent tampering, counterfeiting, or duplication";[63]

(2) *New standards for issuing licenses*, requiring DMVs to obtain and verify proof of identity, residence, and citizenship or legal immigration status; to confirm that license applicants terminate any valid licenses they hold from other states; and to issue licenses that expire simultaneously with any temporary immigration status or, in any event, after no more than eight years;[64]

(3) *Verification, storage, and sharing of vastly more personal information* than DMVs have maintained until now, including not only databases with motor vehicle and driver records but also digital images of all presented identity documents, such as birth certificates and social security cards.[65]

The Act penalizes states that do not meet these standards by instructing federal agencies not to accept their licenses for "any official purpose,"[66] such as boarding a plane or entering a federal building. Noncompliant states must issue special licenses that indicate that they are not acceptable identification for federal purposes, both with a special design or color and

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63. The other required features are: birth date, gender, license or card number, principal-residence address, and signature. REAL ID Act § 202(b). DMVs must also "ensure the physical security" of card-production locations and materials and undertake "appropriate security clearance requirements" for production employees. *Id.* § 202(d)(7)–(8).

64. *Id.* § 202(c)(1)–(3), (d)(6), (d)(9). The required proof of identity and residence comprise:

> (A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth. (B) Documentation showing the person's date of birth. (C) Proof of the person's social security account number or verification that the person is not eligible for a social security account number. (D) Documentation showing the person's name and address of principal residence.

Id. § 202(c)(1). DMVs must obtain "valid documentary evidence" of a person's citizenship or legal immigration status in the United States and train employees in recognizing fraudulent documents. *Id.* § 202(c)(2)–(3) & (d)(9).

65. DMVs must keep "digital images of identity source documents . . . in electronic storage in a transferable format" for at least ten years and paper copies for at least seven years. *Id.* § 202(d)(1)–(2). State motor-vehicle databases must contain all driver's-license and driver-record data and must be accessible electronically to all other states. *Id.* § 202(d)(12)–(13).

66. These penalties take effect three years after enactment. *Id.* § 202(a)(1).

with some sort of printed statement.[67] In light of the many United States citizens who do not have a passport or other federally accepted identification, it does not seem like a real option for states to refuse to acquiesce to these mandates. Nonetheless, Maine and Idaho have passed laws refusing to comply with the REAL ID Act requirements, and by the end of March 2007, forty bills had been introduced in twenty-five states proposing that these states should reject the Act's licensing mandates.[68]

There is a reason for this defiance: meeting the standards is not easy. State officials say the REAL ID Act's requirements are "a nightmare" (Illinois), may require "extreme measures and possibly a complete reorganization" (Nebraska), and are "flat-out impossible" to implement in the time provided (Pennsylvania).[69] A September 2006 report issued by the National Governors Association, the National Conference of State Legislatures, and the American Association of Motor Vehicle Administrators estimates that it will "cost more than $11 billion to implement the REAL ID Act" nationwide, dwarfing the Congressional Budget Office's initial estimate of $100 million.[70] Even seemingly minor requirements, such as the mandate that drivers' licenses display a person's full name, will require expensive software upgrades to enable data fields that can accommodate extremely long names.[71] As of August 2005, only eight percent of states were capable of verifying identity documents; only six percent could obtain and store digital, transferable images of those documents; and for eighty-two percent,

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67. *Id.* § 202(d)(11).

68. *Driving Licenses: Too Much Information*, THE ECONOMIST, Mar. 22, 2007, http://www.economist.com/world/na/displaystory.cfm?story_id=8894485; REAL ID State Legislation Database, National Conference of State Legislatures, http://www.ncsl.org/standcomm/sctran/RealIDdb.cfm (search for "refusal to comply" under "topic(s)" heading) (last visited May 10, 2007); *see also* Daniela Gerson, *Council to State: Opt out of Law Barring Illegal Immigrants from Driver's Licenses*, N.Y. SUN, Dec. 23, 2005, at 3; James Mayer, *Fight over Rules Could Limit Use of Oregon ID*, THE OREGONIAN (Portland, Or.), Jan. 15, 2006, at A1.

69. Brian Bergstein, *National Uniform Driver's License Law Is "Nightmare,"* USA TODAY, Jan. 12, 2006 (quoting an Illinois official, the Nebraska Motor Vehicles Director, and the Deputy Secretary of the Pennsylvania Department of Transportation, respectively), *available at* http://www.usatoday.com/tech/news/techpolicy/2006-01-12-uniform-drivers-license_x.htm; Korey Clark, *States Voice Real Doubts About REAL ID*, STATENET CAP. J., Jan. 23, 2006, http://www.statenet.com/capitol-journal/01-23-2006.pdf.

70. NAT'L GOVERNORS ASS'N, NAT'L CONFERENCE OF STATE LEGISLATURES, & AM. ASS'N OF MOTOR VEHICLE ADM'RS, THE REAL ID ACT: NATIONAL IMPACT ANALYSIS 3 (2006); *see also* Bergstein, *supra* note 69; Clark, *supra* note 69; Editorial, *REAL ID Legislation Needs a Reality Check*, ROANOKE TIMES (Va.), Jan. 16, 2006, at B6.

71. States also note other pragmatic difficulties: current identity documents do not necessarily display a person's full name, nor is it clear in all jurisdictions what constitutes a person's "legal" name. AM. ASS'N OF MOTOR VEHICLES ADMR'S, THE REAL ID ACT: SURVEY OF THE STATES ON IMPLEMENTATION OF DRIVER'S LICENSE AND IDENTIFICATION CARD REFORM 4 (2005) [hereinafter AAMVA State Survey], *available at* http://epic.org/privacy/id-cards/aamva_survey_report.pdf; *see also* Bergstein, *supra* note 69.

implementing such programs will require serious financial expenditures, policy changes, and reprogramming.[72]

2. Fit

These measures are thus a quintessential example of the problem of fit, for two reasons. First, state DMVs' drivers' licensing rules and procedures are not targeted at terrorists or terrorist activities. Rather, they are rules of general applicability that apply to almost every member of the public. Inevitably, therefore, terrorists represent an extremely small percentage of those affected by the REAL ID Act's reforms. Moreover, because these measures do not target terrorists in any particularized way, the chances of effectively detecting or deterring them among the vast number of people who participate in this administrative system are equally small. At the same time, because of the massive scale of DMV operations, the REAL ID Act's reforms represent a great expense and burden, both to the public and to the DMVs themselves.

These regulations also present a problem of fit for a second reason: by attempting to use civil rules that rely on voluntary participation and compliance to catch non-civil actors, the government creates standards that are difficult for the law-abiding public to meet and for the agency to implement, but easy for terrorists and other miscreants to evade. Thus, an irony emerges: as in the financial regulation setting discussed below, terrorists and other miscreants may find it easier to circumvent or thwart the system than law-abiders do to comply with it.

In particular, although drivers' licenses are the most readily available and important form of identification for the American public, terrorists could take one of a number of measures—including some that are legal—to carry on with their activities without participating in the license system. For one thing, they could obtain other forms of identification that would permit them to carry out most activities, terrorist or otherwise. A driver's license is not the exclusive form of identification for any activity, apart from driving itself.[73] As has been frequently noted, the September 11 terrorists could have purchased tickets and boarded planes with their passports or some other identification, and it is still perfectly legal to board a plane with non-drivers' license identification.[74] Indeed, it is difficult to imagine how DMVs could

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72. AAMVA State Survey, *supra* note 71, at 8, 10.

73. Nor do even those commentators who support the REAL ID Act's provisions favor adopting an exclusive form of ID. *See* Paul Rosenzweig & James Jay Carafano, Ph.D., *Federal Standards for State-Issued Identity Cards: A Reasonable Proposal*, BACKGROUNDER (Heritage Found., Wash. D.C.), Feb. 4, 2005, at 4, *available at* http://www.heritage.org/Research/HomelandDefense/upload/74316_1.pdf (noting that foreigners and Americans can board airplanes with their passports rather than a driver's license).

74. *See, e.g.*, Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L & POL'Y REV. 349, 375 (2005).

effectively target terrorists amongst all those applying for drivers' licenses, for drivers' licenses are not necessary for or characteristic of terrorist activities, nor are they resources that terrorists use or abuse in a distinctive way that would make them a red flag for terrorist activity.

Foreign terrorists in particular seem to be, if anything, less likely than American citizens to need a state driver's license, either to carry on with their everyday lives or to carry out their terrorist activities. Of necessity, foreign citizens already possess other forms of federally accepted identification when they enter the United States, such as passports. Foreign citizens may well have foreign drivers' licenses as well, permitting them to drive legally within the United States without entering the drivers' licensing system at all.[75]

Alternatively, terrorists could simply obtain and use state-issued drivers' licenses in their own names, relying on the inherent weaknesses in the system to limit the effectiveness of screening. The very scale of DMV agency action that makes a DMV-based system a poor fit for catching terrorists in the first place also tends to exacerbate some of the potentially disabling glitches that lurk in virtually all identity-based security systems and that terrorists may exploit: fraudulent breeder documents, disabling false positives, and overwhelming amounts of data.

As to the first problem, all identity cards, no matter how high tech, are no more reliable than what are called "breeder documents": the supporting documentation that an applicant must produce to obtain the card in the first place.[76] Here, the only documentation that is common to the entire American population (and thus the most rigorous form of documentation that can be demanded by a DMV in its drivers' licensing regime) is the birth certificate, which remains as trivially easy to forge now as before the REAL ID Act.[77]

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75. USA.gov, Foreign Visitors Driving in the U.S; Quick Facts for Foreign Visitors About Driving in the United States, http://www.usa.gov/Topics/Foreign_Visitors_Driving.shtml (last visited Jan. 25, 2007).

76. *See generally* Bijon Roy, *A Case Against Biometric National Identification Systems (NIDS): "Trading Off" Privacy Without Getting Security*, 19 WINDSOR REV. LEGAL & SOC. ISSUES 45, 59–61 (2005). A social security card (also required by the REAL ID Act) can be obtained with a birth certificate, and the final requirement, proof of residence, does not offer any evidence of identity at all and typically requires nothing more than a form-lease document, which can be obtained for a few dollars from any office-supply store. REAL ID Act of 2005, Pub. L. No. 109-13 § 202(c)(1), 119 Stat. 231, 312.

77. *See* Bob Hager & Bob Sullivan, *Fake Drivers Licenses Easy to Obtain*, MSNBC NEWS, Nov. 21, 2003, http://www.msnbc.msn.com/id/3078924; *Border Security: Continued Weaknesses in Screening Entrants into the United States: Hearing Before Sen. Comm. on Finance*, 109th Cong. 1–3 (Aug. 2, 2006) (statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, Government Accountability Office), *available at* http://www.gao.gov/new.items/d06976t.pdf (describing undercover testing in which GAO employees used "commercial software that is available to the public" to create fake birth certificates and driver's licenses and

Similarly, the vast size of the pool of individuals in drivers' license databases exacerbates the well known problem of disabling error rates in identity databases. The federal government's Terrorist Identities Database Environment, which is intended to maintain a watch list of terrorism suspects, had a misidentification rate of almost fifty percent in 2004 and 2005.[78] Such problems are not an anomaly: a pilot Immigration and Naturalization Service ("INS") database intended to store the names of eligible noncitizen workers suffered from a crippling twenty-eight percent error rate, and identity databases based on computerized biometric recognition tend to yield error rates of between ten and sixty-six percent.[79] Even if the DMVs' databases were to have a ninety-nine percent accuracy rate, there would be a false positive for one of every 100 people going through the system—and where the DMVs are concerned, there are millions of people in the system. At such rates, DMVs would be swamped by the task of checking false positives.[80] Furthermore, this assumes that the resources exist to review and follow up on all of this data. With millions of drivers in most states, and several breeder identity documents per driver, the number of documents that DMVs will need to process, store, and evaluate will quickly reach into the tens of millions. At this scale, it is likely that the DMVs will create an overload of information for security screening, just as the National Security Agency has found itself drowning in the fire hose of data from its monitoring of electronic communications and as the amount of information dumped into the Terrorist Identification Database Environment "threatens to overwhelm" analysts.[81]

Finally, the REAL ID Act's focus on bolstering an identity-based security system is a poor fit for actual terrorist behavior in another sense. All that even the best identity-based security system can hope to do on its own is to accurately connect names to individuals. But because al Qaeda and other terrorist networks are known to operate through sleeper cells, an individual's identity, however positively confirmed, is a weak test of that individual's terrorist propensities.[82] For example, as legal visitors to the

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successfully use these to enter the United States); *Got A Fake ID? Welcome to America*, CBS EVENING NEWS (Aug. 1, 2006), http://www.cbsnews.com/stories/2006/08/01/eveningnews/main1857671.shtml.

78. Karen DeYoung, *Terror Database Has Quadrupled in Four Years*, WASH. POST, Mar. 25, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/24/AR2007032400944.html.

79. Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 360 (2002).

80. Roy, *supra* note 76, at 60–64; Bruce Schneier, *Why Data Mining Won't Stop Terror*, WIRED.COM, Mar. 9, 2006, http://www.wired.com/news/columns/0,70357-0.html?tw=wn_index_2.

81. DeYoung, *supra* note 78; Scott Shane, *For the E-Spy, Too Much Information*, N.Y. TIMES, Aug. 28, 2005, § 4 (Week in Review), at 2.

82. Roy, *supra* note 76, at 59; Sobel, *supra* note 79, at 367.

United States, the September 11 terrorists would have been eligible for drivers' licenses, albeit temporary ones, under the REAL ID Act.[83]

Indeed, by encouraging reliance on the possession of a driver's license card as evidence of government-vetted security, this new regime may be counterproductive. Overconfidence in the driver's license as a signal of security may reduce the perceived need for other security measures and for attentiveness to other security indicators. If so, first time, previously unidentified, and misidentified terrorists, once in possession of a state-issued driver's license, may find themselves able to act more freely under its imprimatur of false security.

3. Inexpertise

In order to serve what is, in effect, the entire public and to process thousands of people per day, DMVs operate at one extreme of trade-offs in agency values and characteristics, opting for efficiency over accuracy and for public accountability over agency discretion. Nondiscretionary standards for qualification are set by state legislatures and departments of transportation and applied in rote, assembly line fashion by low-level state-government bureaucrats on the spot.[84] The rules for obtaining a driver's license or registering a car are low baseline, coarse grained rules of limited sorting ability: they do not attempt to optimize safety, driving ability, or any of the other values they promote, but merely to assure compliance with minimum standards. In addition, DMVs apply minimal scrutiny to public compliance with these rules, typically accepting proffered documents and information at face value, relying on the notion that most of those who participate do so voluntarily and in good faith.

In brief, DMVs have developed a narrow, specialized expertise—the registration, insurance, and safety of automobiles—and a distinctive approach to managing their massive mandate—maintaining a high volume, low budget operation. The results are striking: although citizens widely deride DMVs as inefficient and slow,[85] driver licensing is nonetheless, as

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83. Review and Outlook, *National ID Party*, WALL ST. J., Feb. 19, 2005, *available at* http://www.opinionjournal.com/editorial/feature.html?id=110006316.

84. *E.g.*, 75 PA. CONS. STAT. ANN. § 1501–20 (West 2005).

85. As recalled on a humor website:

> After spending 3-1/2 hours enduring the long lines, surly clerks and insane regulations at the Department of Motor Vehicles, I stopped at a toy store to pick up a gift for my son. I brought my selection—a Louisville slugger baseball bat—to the cash register. "Cash or charge?" the clerk asked. "Cash," I snapped. Then apologizing for my rudeness, I explained, "I've spent the afternoon at the motor-vehicle bureau." "Shall I gift wrap the bat?" the clerk asked sweetly, "or are you going back to the DMV?"

Amazing Humor.com, Funny Political Jokes, Nothing Like the DMV, http://www.amazinghumor.com/jokes/politicaljokes/nothinglikethedmv.shtml (last visited Jan 25. 2007).

compared to other types of agency functions, a relatively simple and swift adjudication process that requires no special training, with rules and implementation that are accessible and understandable to the general public.

In this light, measures like the REAL ID Act's requirement that DMVs verify applicants' immigration status take DMVs outside their area of expertise and undermine their core purpose. While the primary purpose of drivers' licenses is to ensure that all drivers have basic driving skills, an understanding of the rules of the road, and possession of appropriate insurance, the REAL ID Act will force millions of illegal immigrants out of the licensing and insurance system.[86] This step may also undermine one of the Act's national security goals. If one purpose of the REAL ID Act's identity databases is to create comprehensive records of those in the country, the absence of these millions of immigrants from those records will thwart that aim as well.

The REAL ID Act's mandates may also prove counterproductive to other national security goals, for in this setting, a job done poorly may be worse than a job not done at all. The risks of fraud and identity theft loom particularly large. The REAL ID Act's mandated electronic databases of scanned breeder documents will offer fresh opportunities for fraud, even as they close off others, by creating "one stop shopping" in identity information and documentation for hackers, thieves, and terrorists.[87] These new databases could present a new target for terrorism; just as new, seemingly secure documents could serve as a Trojan horse for terrorist activity due to their higher presumption of reliability. Inexpert DMV administration of identity documents and databases is not just self-defeating, but dangerous.[88]

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86. In advocating for such measures, proponents of stricter penalties for illegal immigrants undervalue the benefits of licensing a driver that accrue to the public by safeguarding them from unsafe or uninsured drivers. *Compare* Rosenzweig & Carafano, *supra* note 73, at 5–6, *with* Legal Presence and DL/ID—Should Undocumented Immigrants Be Allowed to Have a DL/ID?, http://www.aamva.org/aamva/DocumentDisplay.aspx?id=%7B028B748F-AC91-4A7C-AD6F-4777F6AFE469%7D (last visited May 14, 2007) (documenting the debate of the pros and cons of allowing undocumented immigrants to have a drivers' license or identification card).

87. Roy, *supra* note 76, at 71; A. Michael Froomkin, *Creating a Viral Federal Privacy Standard*, 48 B.C. L. REV. 55 (2007); Patrick Peterson, *Real ID Act Spurs Real Concerns*, FLA. TODAY (Brevard County, Fla.), May 13, 2005, *available at* http://www.prisonplanet.com/articles/may2005/130505realconcerns.htm; *see also* James Jay Carafano, Paul Rosenzeig, & Alane Kochems, *Encrypt E-Passports*, HERITAGE FOUND., Mar. 15, 2005, http://www.Heritage.org/Research/HomelandDefense/wm687.cfm (giving a conservative critique of inadequately safeguarded document technology).

88. For a conservative analysis of measures necessary to protect data, see Paul Rosenzweig & Alane Kochems, *Data Protection: Safeguarding Privacy in a New Age of Technology*, HERITAGE FOUND., Mar. 23, 2005, http://www.heritage.org/Research/HomelandDefense/lm16.cfm.

4. Overdiscretion

Fundamental principles of administrative law would suggest that an assignment of new authority (and especially authority outside an agency's expertise) should be accompanied by increased external oversight of that authority. But here, although the REAL ID Act grants new spheres of authority to DMV employees, it offers no direction to these agencies as to the procedures they should follow, nor does it make any provisions for oversight or review. The REAL ID Act thus expands DMV discretion while at the same time requiring the agency to undertake tasks at which it is inexpert, ultimately placing access to an essential public benefit at the mercy of street-level DMV employees.

We might hope that the DMVs will not follow the patterns of other agencies like the Treasury Department[89] that have delegated their new responsibilities to low-level bureaucrats with singular decision-making authority. However, given the volume of drivers' license applications to be processed and the lack of any mandate of oversight or review in the Act, it is difficult to imagine that DMVs will do otherwise.

Past experience also suggests that unfettered DMV exercise of discretion in this area may produce less than salutary results. When trying to clear up the incorrect and duplicate social security numbers in its system a few years ago, the New York DMV decided that the optimal way to do so was to threaten to summarily suspend 600,000 licenses if the holders did not provide valid social security numbers within fifteen days. Particularly in light of the database error rates discussed above, the DMV's failure to adopt a more moderate approach seems imprudent, at best. A lawsuit prevented this step from being implemented, primarily because the judge found that the DMV acted outside its discretion.[90] Now, under the REAL ID Act, the New York DMV has this authority, but it is unlikely it has developed the capacity to exercise prudently its newly delegated discretion.[91]

5. The Effect on Proxies

What is most striking about the REAL ID Act's new DMV mandates is that none of them has anything directly to do either with terrorist activities or with singling out and targeting behaviors that are red flags for terrorism—nor are they intended to. As such, these measures target proxy groups: those who are unable to provide and unwilling to falsify the supporting documentation necessary to obtain drivers' licenses. Advocates of the REAL ID Act's measures argue that this will have some indirect effect on

89. *See* discussion *infra* Part IV.

90. *See* Cubas v. Martinez, No. 112371/04, slip op. at 18 (N.Y. Sup. Ct. May 9, 2005), *available at* http://www.nycourts.gov/press/dmvFinal.pdf (enjoining the DMV).

91. REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(1), 119 Stat. 231, 312 (2005).

terrorists that is itself enough to justify these sweeping reforms.[92] But the groups that the REAL ID Act's provisions are in fact most likely to capture are exactly the proxy groups they target—in this case, primarily illegal immigrants. While we may wish to limit illegal immigration, such measures should be justified on their own merits according to the costs and benefits involved in targeting illegal immigration, not by putting the false weight of a national security finger on the scales.[93]

These regulations will also affect other vulnerable populations who are unable to meet one or more of the new requirements: "poor, elderly or disabled residents [unable] to produce the necessary documents,"[94] legal immigrants whose documents are difficult to verify, and devout members of faiths whose tenets forbid them to display their faces for photo identification.[95] Other members of the general public will likely be caught up as well, whether through the DMV's inexpert, unsupervised administration or simply through the ordinary error rates in identity databases. The effect on these proxy groups and others is potentially dire: in addition to the loss of federally acceptable ID, denial of the driving privilege may amount, in some areas, to loss of the opportunity to work, attend school, and otherwise lead a responsible, self-sustaining existence.[96]

6. Conclusion

All in all, the DMV drivers' licensing system is an astonishingly poor fit for detecting and deterring terrorist activities. As a regime that affects the entire public, its reform imposes enormous financial costs on agencies intended to serve an entirely different purpose. As a system applicable to the public at large, it does not successfully target hallmarks of terrorist activity, and by virtue of its sheer scope and size, it cannot function effectively in identifying and isolating individuals who present security threats. The REAL ID Act's security imperatives push an agency from its classic bureaucratic task of rationalizing a narrow set of expert tasks to purposes and procedures in which it has no special expertise and which require discretionary decision-making from low-level bureaucrats accustomed to rote application of simple rules with no particular provision for oversight. It is a fundamental mismatch

92. Rosenzweig & Carafano, *supra* note 73, at 3

93. Some conservative commentators agree that the immigration issue "really is separate from the national interest in more reliable and secure forms of identification" and "[if] regulating immigration and incentives affecting illegal immigration is the real purpose of congressional legislation, it ought to be addressed in separate legislation." *Id.* at 6.

94. *REAL ID Legislation Needs a Reality Check*, *supra* note 70, at B6.

95. COUNCIL ON AMERICAN-ISLAMIC RELATIONS RESEARCH CTR., RELIGIOUS ACCOMMODATION IN DRIVER'S LICENSE PHOTOGRAPHS: A REVIEW OF CODES, POLICIES AND PRACTICES IN THE 50 STATES 3 (2004), *available at* http://www.cair-net.org/downloads/driversphoto.pdf.

96. *See* Raquel Aldana & Sylvia R. Lazos Vargas, Book Review, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1717–18 (2005).

between agency discretion and external oversight and between task and expertise.

B. USCIS AND POLITICAL ASYLUM

Political asylum is meant to provide a safe haven for refugees and a bulwark against genocide, crimes against humanity, torture, and other violations of human rights. In order to obtain asylum in the United States, an applicant must have experienced "persecution or [have] a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" in her home country (or, if the applicant is stateless, in her country of long-term residence).[97]

While the admission of asylees as such into the United States dates back only to the 1950s, the process continues a much longer tradition of accepting immigrants who are fleeing persecution or simply seeking a better life. In so doing, it contributes to a central aspect of our national identity: that we are, as President George W. Bush put it, "a stronger and better nation because of the hard work and the faith and the entrepreneurial spirit of immigrants" and that we have benefited by welcoming those whose "talents and dreams" other societies have rejected or repressed.[98]

In addition to these roles, political asylum has traditionally served national security goals. Indeed, until 1980, asylum admissions were openly tied to foreign policy, as eligibility to apply for asylum was determined by ad hoc legislation authorizing admissions from communist states and other Cold War enemies.[99] Today, admission of asylees still presents an opportunity to cultivate an image of the United States as a "beacon for freedom"[100] and to vilify the nations from which refugees have fled.[101]

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97. Immigration and Nationality Act, 8 U.S.C. § 101(a)(42)(A) (2005).

98. Press Release, President George W. Bush, President Bush Proposes New Temporary Worker Program: Remarks by the President on Immigration Policy (Jan. 7, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html. President Bush stated:

> By tradition and conviction, our country is a welcoming society. America is a stronger and better nation because of the hard work and the faith and the entrepreneurial spirit of immigrants. Every generation of immigrants has reaffirmed the wisdom of remaining open to the talents and dreams of the world.

Id.

99. Michael McBride, *Migrants and Asylum-Seekers*, 37 INT'L MIGRATION 289, 292–94 (1999); RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERVICE REPORT RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 2 (2005), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rl32621.pdf.

100. President George W. Bush, Statement by the President in His Address to the Nation (Sep. 11, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html.

101. In 2003, the top three countries for approved asylum claims were Colombia, China, and Haiti, in contrast to the U.S.S.R., Vietnam, and Cuba during the Cold War. OFFICE OF IMMIGRATION STATISTICS, U.S. DEPARTMENT OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS 47 (2004).

1. The New Regulatory Scheme

While the U.S. government has treated asylum as a means to secure its foreign policy goals through strategic admissions, it has also feared that these admissions present a security risk, since applicants typically hail from states that are oppressive, unstable, or both.[102] The REAL ID Act is a legislative expression of this fear, and it is not the first. In 1996, following a series of terrorist attacks—some committed by foreign nationals, including asylum seekers, and others committed by U.S. citizens—Congress enacted the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[103] Among other measures, AEDPA eliminated judicial review of certain deportation orders and expedited asylum proceedings,[104] while IIRIRA expanded on AEDPA's provisions and provided for mandatory detention of many asylum seekers, "expedited removal" of asylum seekers at the border, and imposed other limits on asylum applications.[105] The REAL ID Act also builds upon the post-September 11 PATRIOT Act and the Intelligence Reform and Terrorist Prevention Act of 2004 ("IRTPA"), which introduced broader definitions of terrorism and terrorist associations for purposes of deportation and inadmissibility.[106]

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102. For example, in 2005, the four countries that produced far and away the greatest absolute numbers of successful asylum applicants to the United States, comprising more than one-third of all the granted applications that year, were China, Colombia, Albania, and Haiti. OFFICE OF PLANNING, ANALYSIS AND TECH., U.S. DEPT. OF JUSTICE, IMMIGRATION COURTS: FY 2005 ASYLUM STATISTICS 1–2, 4 (2006), *available at* http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf; *see also* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 233–35 (2004).

103. Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546. Curiously, while the anti-immigration aspects of these measures were based, at least in part, on attacks committed by noncitizens, they seem to have been most immediately spurred by the Oklahoma City bombing, which had no known foreign involvement. Also in play were economic and social concerns raised by asylum procedures that were considered too lax since ultimately unsuccessful applicants were able to readily enter and remain in the United States under the procedures then in place. Kathryn Harrigan Christian, Comment, *National Security and the Victims of Immigration Law*, 35 STETSON L. REV. 1001, 1014–16 (2006); DAVID A. MARTIN, CTR. FOR IMMIGRATION STUDIES, THE 1995 ASYLUM REFORMS: A HISTORIC AND GLOBAL PERSPECTIVE (2000), http://www.cis.org/articles/2000/back500.pdf.

104. AEDPA §§ 440, 421–23.

105. *Id.*; IIRIRA § 604; 8 U.S.C. §1252 (a)(2)(C) (2001)

106. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272. In the debate over the Intelligence Reform and Terrorist Prevention Act (IRTPA) of 2004, Pub. L. No. 108-458, 118 Stat. 3638, Congress considered, but did not enact, many of the measures that eventually were included the REAL ID Act. ANDORRA BRUNO ET AL., CONGRESSIONAL RESEARCH SERVICE REPORT RL33125, IMMIGRATION LEGISLATION AND ISSUES IN THE 109TH CONGRESS 2 (2005), *available at* http://trac.syr.edu/immigration/library/P14.pdf.

In Title I of the REAL ID Act, "Amendments to Federal Laws to Protect against Terrorist Entry," Congress amended numerous sections of the Immigration and Nationality Act ("INA"), introducing certain crucial changes affecting how the USCIS processes asylum claims:

(1) *The Act makes the legal standard for attaining refugee status more demanding for all asylum applicants,* requiring asylum applicants to establish that "race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant";[107]

(2) *It vests greater discretion in the administrative adjudicator* in assessing the applicant's credibility and requiring corroborating evidence even of "persuasive" testimony;[108] and

(3) *It limits judicial review of the adjudicator's expanded exercise of discretion* by preserving judicial review only for constitutional and legal claims (as required by a 2001 Supreme Court decision) and not for discretionary or factual findings.[109]

Attempts to correlate asylum applicants and terrorists have proven to be weak, however, leading us to focus again on the problem of fit in this context. Within USCIS, the problems of overdiscretion and inexpertise interact synergistically, so we discuss those problems together.

2. Fit

Like the REAL ID Act's drivers' licensing provisions, its asylum provisions do not attempt to hone the asylum adjudication system's ability to distinguish terrorist from non-terrorist applicants.[110] Instead, they change

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107. REAL ID Act § 101(a)(3), Pub L. No. 109-13, div. B, 119 Stat. 302 (2005) (emphasis added); *cf. Matter of* T-M-B, 21 I. & N. Dec. 775, 777 (BIA 1997) (stating that applicants must "produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground"); *Matter of* Fuentes, 19 I. & N. Dec. 658 (BIA 1998) (stating that an applicant "must demonstrate that he is unwilling or unable to return to his country" because of "race, religion, nationality, membership in a particular social group, or political opinion" (citing 8 U.S.C. § 1158 (1982))).

108. REAL ID Act § 101(a)(3).

109. The Act also specifically bars courts from reversing requirements of corroborative evidence unless "a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." *Id.* § 101(e). In addition, it vests discretion over asylum decisions in the Director of Homeland Security, in addition to the Attorney General; eliminates a planned study on vulnerabilities in the asylum system; and, in a pair of changes benefiting asylum applicants, lifts the caps on applicants whose claims are based on coercive population controls and on the number of asylees permitted to change status to permanent residents each year. *Id.* § 101(b)–(d), (f)–(h).

110. It is worth noting that in its non-asylum-related immigration provisions, the Act also expands the prohibited connections to terrorism that bar all immigrants from admissibility. *Id.* § 103(b)–(c) (2005). Of particular note are its new definitions of "material support" for a "terrorist organization," which diverge from the criminal definitions of crucial terms and are of troubling breadth. *Compare id. with* 18 USC §§ 2339a–2339b (as amended by the USA PATRIOT Act); *see also Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the*

the baseline rules for a large population that is voluntarily providing information to the government in exchange for the benefit of political asylum. Like drivers' licensing, political asylum is neither necessary to terrorist activity, nor is it something that terrorists use in distinctive ways that are a red flag for terrorism. As with drivers' licensing, the only way of searching for terrorists in the pool of asylum applicants is to examine each application, one by one. It is a large pool: while the political asylum process does not implicate virtually every person in the United States as drivers' licensing does, in 2003, the agency received applications for 61,660 applicants and family members, and during the period from 1996 to 2002, there was an average of 64,697 applications per year.[111]

Moreover, the fit between this pool and terrorists is a weak one. As the 9/11 Commission staff has noted, "very few people" amongst the millions of annual immigrants to the United States pose any threat to national security.[112] Asylum applicants are no exception to this rule. Virtually every incident of convicted terrorists entering via the asylum system dates to the early 1990s, before mandatory FBI security checks and detention of virtually all entering asylum seekers made asylum an unappealing avenue into the United States.[113] Asylum is a voluntary system, only one of many ways of entering the United States, and terrorists can and do opt out of this system by choosing one of these other paths. At present, the available evidence concerning asylum seekers' propensity to engage in terrorist activity seems to be anecdotal, not systematic: we did not find any data on the number of immigrants who engage in or support terrorist activity, much less on the

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PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (May 10, 2005) (statement of Ahilan T. Arulanantham, Staff Attorney, Am. Civil Liberties Union of S. Cal.), *available at* http://www.aclu.org/safefree/general/17536leg20050510.html; USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, 151 Cong. Rec. H6221-03, H6233 (July 21, 2005).

111. The number of applications has fluctuated substantially, with peak levels in the hundreds of thousands of applications per year in the mid-1990s. OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 56, 68 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003/Yearbook.pdf.

112. NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 383 (2004), [hereinafter 9/11 COMMISSION REPORT], *available at* http://www.9-11commission.gov/report/911Report.pdf. Some of these immigrants come for brief visits, while others stay for longer periods.

113. Lofgren, *supra* note 74, at 355–56, 366–67 & 375; WASEM, *supra* note 99, at 10. There is, however, a substantial and well-publicized problem of asylum applicants who have themselves been the victims of terrorism being rejected on the basis of the material-support provisions discussed *supra* note 110. Darryl Fears, *Conservatives Decry Terror Laws' Impact on Refugees*, WASH. POST, Jan. 8, 2007, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/07/AR2007010701144.html. Thus far, the government's only response has been a limited waiver program for applicants from a handful of countries. Rachel L. Swarms, *Administration Offers Plan to Ease Rules on Asylum*, N.Y. TIMES, Jan. 12, 2007, at A18, *available at* 2007 WLNR 651443.

number of asylum seekers who do so, nor any data comparing terrorist propensities among immigrants as opposed to citizens.[114]

Furthermore, if the correlation between asylum seekers and terrorists is poor, the correlation between the changes introduced by the REAL ID Act and terrorist behavior is worse. As in other agencies that depend on information volunteered by participants in exchange for a benefit, reforms to the general reporting standards applicable to all participants burden genuine, good faith participants as a matter of course. However, they tend to be easy for terrorists and other bad faith actors to evade by providing false information. Genuine asylum applicants often do not have corroborating evidence for their claim, having fled their countries without stopping to gather supporting documentation.[115] Nor can asylum applicants always demonstrate the motive of their persecutors and how "central" that motive is to their persecution.[116] As Representative Langevin argued, with some rhetorical hyperbole, in protest of the REAL ID Act's restrictions, "Can we imagine sending a refugee back to face genocide in the Sudan because he or she does not have a letter from the government explaining that religion was the reason his or her family was murdered?"[117] But by obtaining false documentation and providing false testimony, terrorists can readily appear to meet these standards. These measures thus present the quintessential problem of using civil rules to try to reach non-civil actors: those actors either opt out or simply refuse to play by the rules.

3. Inexpertise and Overdiscretion[118]

The REAL ID Act's asylum measures take an agency that is excoriated for its incompetence and abuse of discretion and grant it greater authority and discretion in the name of national security. In theory, the USCIS ought to have the expertise to accurately adjudicate asylum claims and exercise discretion judiciously. However, when we look below the surface of the agency's assigned capability and authority to assess how the agency actually exercises that capability and authority, the reality is quite different.

In fact, judicial review has long revealed the U.S. immigration agency to be a disorganized and beleaguered organization, notorious for backlogs and for arbitrary, legally erroneous decisions.[119] While efforts to improve

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114. *E.g.*, Philip Martin & Susan Martin, *Managing Migration to Prevent Terrorism*, *in* 29 MIGRATION WORLD 19 (2001); CARL F. HOROWITZ, CENTER FOR IMMIGRATION STUDIES, AN EXAMINATION OF U.S. IMMIGRATION POLICY AND SERIOUS CRIME 9–10 (2001).

115. *See* MARTIN, *supra* note 103, at 3

116. *Id.*

117. 151 CONG. REC. E247 (Feb. 15, 2005) (statement of Rep. James R. Langevin).

118. While we discuss these two issues separately in other sections of this Article, here we address them together because the problems are so closely interrelated in this context.

119. Congress has repeatedly passed laws divesting the courts of appellate and habeas jurisdiction over immigration decisions. The REAL ID Act codifies a recent Supreme Court

performance at the asylum officer level have reportedly borne some fruit, this has not been so at the level of immigration judges—the determinative fact finders in any claims that are not immediately granted upon initial review. Federal judges reviewing asylum decisions have repeatedly found, in the words of Judge Posner, that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[120] In December 2005 and January 2006, judges reviewing asylum decisions in the Third and Seventh Circuits castigated the involved immigration judges and the Board of Immigration Appeals (the body that carries out administrative reviews) for a pattern of arbitrary, unlawful, and biased rulings: "At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals. . . . The performance of these federal agencies is too often inadequate."[121]

The REAL ID Act's measures rely on raising the legal standards for asylum and increasing agency discretion in holding applicants to those standards. However, USCIS's inadequacy in adjudicating claims suggests that such an approach is likely to be counterproductive. As Patricia Freshwater has noted, "terrorists are already barred from any grant of asylum if their claims are accurately adjudicated. For this reason, the United States should have a security interest in providing the most accurate adjudication of asylum claims possible."[122] The REAL ID Act's focus on standards, corroborating evidence, and applicant credibility are red herrings: the weak link is not the standards that the agency is asked to apply, but agency incompetence and abuse of discretion in applying them.

Altering legal standards in asylum cases is a particularly curious way of addressing any security holes that might be perceived to exist in the asylum system in light of the fact that the FBI conducts expert, direct security checks of all asylum seekers. The FBI security check is the first step in the evaluation of an asylum claim, and it includes fingerprinting as well as multiple background checks in the terrorist, immigration, and law enforcement

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decision, *INS v. St. Cyr*, 533 U.S. 289 (2001), asserting that review of constitutional and legal claims must be available, while the Act expressly strips the courts of jurisdiction over any discretionary or fact-based claims. REAL ID Act of 2005, Pub L. No. 109-13, § 106(a), 119 Stat. 302, 310-11 (2003). For an analysis of the judicial-review provisions of the REAL ID Act, see generally Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459 (2006).

120. Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (quoting Judge Richard A. Posner).

121. Pasha v. Gonzales, 433 F.3d 530, 531 (7th Cir. 2005) (internal citations omitted); *see* Sukwanputra v. Gonzales, 434 F.3d 627 *passim* (3d Cir. 2006).

122. Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of Its Citizens?*, 19 GEO. IMMIGR. L.J. 585, 592 (2005) (emphasis omitted) (internal citations omitted).

databases, notably the Interagency Border Inspection System (IBIS),"[123] which links to seven other FBI, former INS, and State Department databases,[124] and an "expanded screening list"[125] against which foreign nationals can be checked. While no one would claim that the FBI performs its tasks perfectly, surely improving FBI performance would be a more effective security measure than supplementing expert FBI terrorist investigations with inexpert UCICS evaluations that are not specifically targeted at detecting terrorist activity.[126]

Remarkably, the REAL ID Act actually undermines the development of agency expertise rather than bolstering it. Among its other measures, the Act scuttled a study called for by the IRTPA in 2004 that was to have investigated how many, if any, asylum applicants have been connected in some way to terrorist activities, as well as the effects of the relevant legal standards on those cases. This is data that the agency might have used to develop real expertise in sussing out terrorists or to conclude that the asylum system is not the place to be looking for them after all.[127] Instead, the REAL ID Act simply presumed that these linkages exist and cancelled the study.[128]

Core concepts of administrative law suggest that when agencies consistently carry out their tasks incompetently, and especially when internal agency oversight mechanisms prove ineffective, the balance between agency discretion and external oversight should shift toward greater oversight.[129] Here, it seems obvious that, as a matter of agency capability, these administrative adjudicators need more supervision, not less. Instead, the REAL ID Act increases agency discretion and limits judicial oversight of the very fact-based determinations that are at the heart of asylum claims.[130]

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123. WASEM, *supra* note 99, at 10.

124. *Id.* at 10 n.35.

125. President George W. Bush, Speech Outlining a Plan to Give Legal Status to Immigrants (Jan. 7, 2004), *available at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=36498.

126. Identified terrorists and members of terrorist organizations are already barred by statute from receiving asylum, irrespective of the validity of their claims of persecution, as are applicants who are deemed terrorist risks, have advocated terrorist activity, or have given material support to a terrorist organization. 8 U.S.C. § 1182(a)(3)(B) (2000).

127. Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, § 5403(a)-(b), 118 Stat. 3638, 3737 (2004).

128. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(i) 119 Stat. 231, 302 (2005); *see also* 151 CONG. REC. 455 (daily ed. Feb. 9, 2005) (statement of Rep. Jackson-Lee) (stating that terrorists were barred by statute from claiming asylum and that, in any event, it was unlikely that a terrorist would attempt to use it).

129. Discussion *supra* Part II.A.

130. This is particularly calamitous because it follows upon a 2002 change in agency policy that curtailed the administrative process of review for asylum decisions, adopting new rules that, among other things, permit a single BIA member to issue a summary dismissal of an administrative appeal without any written opinion. John R.B. Palmer et al., *Why Are So Many*

4. The Impact on Proxies

The REAL ID Act's provisions on political asylum target a particularly vulnerable group as proxies for terrorists: those who have been driven from their homes by persecution and are at the mercy of another state to take them in. As Immigration Judge Denise Slavin, the President of the National Association of Immigration Judges, has explained, asylum adjudications involve high stakes, "life-or-death decisions in terms of whether you're going to send someone back to a place where they may be killed."[131] While the harm that could come from inadvertently granting a terrorist's claims for asylum is certainly great, the risk of harm faced by asylum seekers erroneously deported to their home countries is also serious.

In passing the REAL ID Act, Congress also targeted another kind of proxy: the political asylum process itself. These reforms take one side in a longstanding, ongoing debate over the proper legal and evidentiary standards in the political asylum process. Some critics of the pre-REAL ID Act tests and evidentiary standards asserted that they were too low to effectively cull out fraudulent and terrorist applicants,[132] while others contended that the same tests and standards were so demanding as to obstruct recognition of legitimate claims.[133] Underlying the claims of both camps is the argument that the adjudicative process has a limited capacity to assess cases that are centered on the types of legal questions the process asks and subject to the limited evidence available to many asylum applicants.[134]

But if these critiques are correct, they should raise similar questions about the potential capacity of this system to distinguish between terrorist and non-terrorist applicants and about the effectiveness of the REAL ID Act reforms, no matter what standards are applied. Heightened evidentiary standards will not help adjudicators make more accurate decisions if the evidence necessary to meet those standards is as often lacking in cases of

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People Challenging Board of Immigration Appeals in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 GEO. IMMIGR. L.J. 1, 28 (2005). Previously, panels of three board members would hear appeals and issue written decisions in each case. *Id.* The changes are an effort to remedy a backlog of over 56,000 cases. *Id.* at 3. Federal judges reviewing these cases on appeal have offered vitriolic criticism of this change, stating that the current process constitutes no review at all. *Id.* at 29–31.

131. Liptak, *supra* note 120, at A1.

132. Mark Krikorian, *Who Deserves Asylum?*, COMMENT., June 1996, at 52, *available at* http://www.cis.org/articles/1996/msk6-96.html.

133. Considering case studies of asylum seekers fleeing the Salvadoran and Guatemalan civil wars, Susan Bibler Coutin concluded that "continual violence, surveillance and interrogation made the causes of persecution unclear and defined average people as potentially subversive," creating a "gap between legal definitions of persecution and the repressive tactics that are directed at suspect populations." Susan Bibler Coutin, *The Oppressed, the Suspect and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 LAW & SOC. INQUIRY 63, 65, 75 (2001).

134. MARTIN, *supra* note 103, at 3.

persecution as in cases of non-persecution. In asylum cases, whether fraudulent or genuine, the amount of information available is often limited by geographical and chronological distance, unavailability of witnesses, lack of access to or loss of key documents, the effect of trauma on the memory and testimony of the applicant, cultural and linguistic barriers, and so forth.

The lack of any apparent connection between the REAL ID Act's new standards and terrorism as such, together with the connection to this longstanding debate in asylum law, suggests that in passing the REAL ID Act, Congress and the Bush Administration may not have been aiming for terrorists and hitting a proxy group at all. Rather, the government may have hit exactly the target it had in its sights by achieving desired reforms to the political asylum process under the guise of national security.[135]

Beyond the effect on asylum applicants and on the political asylum process, the REAL ID Act's focus on foreigners as a proxy for terrorists is dangerous for national security as well. Of course, domestic terrorism is far from unknown in the United States, as the Unabomber, Timothy McVeigh, and other well known American terrorists illustrate. The assumption that post-September 11 terrorists are necessarily foreigners has already been put to the lie in Britain, where the suspects in the July 2005 bombing attacks on London public transportation were "British, born and bred."[136] In the United States, while the September 11 attacks were particularly spectacular and deadly, "the number of domestic terrorist acts in the past five years far outweighs the number of international acts."[137] Pointing to domestic terrorists like William Krar, "an East Texas man who stockpiled enough sodium cyanide to gas everyone in a building the size of a high school basketball gymnasium before he was arrested in 2002,"[138] one terrorism expert warned that "[t]he government has a severe case of tunnel vision when it comes to domestic terrorism."[139] While we should not turn a blind

135. *See* Cohen et al., *supra* note 20, at 724–27 (making a similar argument concerning the government's decision to transfer agencies into the Department of Homeland Security).

136. Matthew Chance, *Britain's Home-grown Terrorists*, CNN.COM, July 14, 2005, http://www.cnn.com/2005/WORLD/europe/07/14/homegrown.terror/.

137. Kris Axtman, *The Terror Threat at Home, Often Overlooked*, THE CHRISTIAN SCI. MONITOR, Dec. 29, 2003, *available at* http://www.csmonitor.com/2003/1229/p02s01-usju.html (referring to an interview with Mark Pitcavage of the factfinding department at the Anti-Defamation League).

138. Larry Copeland, *Domestic Terrorism: New Trouble at Home*, USA TODAY, Nov. 14, 2004, http://www.usatoday.com/news/nation/2004-11-14-domestic-terrorism_x.htm; *see also* Terry Frieden, *FBI, ATF Address Domestic Terrorism*, CNN.COM, May 19, 2005, http://www.cnn.com/2005/US/05/19/domestic.terrorism; *Democracy Now: FBI Whistleblower: White Supremacists are Major Domestic Terror Threat* (radio broadcast May 19, 2005), *available at* http://www.democracynow.org/article.pl?sid=05/06/13/145217 (interviewing former FBI agent Mike German).

139. Axtman, *supra* note 137 (quoting Daniel Levitas, author of THE TERRORIST NEXT DOOR: THE MILITIA MOVEMENT AND THE RADICAL RIGHT (2002)).

eye to the risks of foreign terrorism, focusing our national security measures almost exclusively on foreign risks is to mistake the proxy for the terrorist.

5. Conclusion

Targeting immigrants as proxies for terrorists may make us all feel safer, but these measures are unlikely to make us safer in fact, especially in the inexpert, unsupervised hands of the USCIS. Rather than focusing on improving the security measures that are already in place, taking measures to improve the expertise and capability of asylum adjudicators, or at least increasing oversight of their alarmingly arbitrary practices, the REAL ID Act's reforms seem guaranteed to introduce more risk into the system.

IV. THE PATRIOT ACT AND THE FINANCIAL WAR AGAINST TERROR

A. OFAC AND THE EVOLUTION OF THE ASSET FREEZE

Many commentators have worried about the civil-liberties problems created by the Treasury Department's Office of Foreign Assets Control ("OFAC").[140] Because the agency is freezing the assets of organizations it suspects of cooperation with terrorists through a civil administrative process that involves none of the usual checks of the Fourth Amendment, their fears are not unwarranted.[141] But we think there are even more fundamental problems with OFAC's war on terror. The use of financial regulation to take and, in some cases, operate the property of American charities and individuals in the name of that war has been inexpert and unchannelled, as well as incongruous.[142]

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140. *See, e.g.*, Nicole Nice-Petersen, Note, *Justice for the "Designated": The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1388, 1405–19 (2005) ("The current procedures provided to U.S. entities under IEEPA fall far short of meeting basic due process requirements."); Laila Al-Marayati, *American Muslim Charities: Easy Targets in the War on Terror*, 25 PACE L. REV. 321, 321 (2005) (discussing how government actions in the war on terror "seriously affect the rights of Americans both to engage in charitable giving and to know that their government's efforts directly result in the increased safety and security of the American people").

141. As the 9/11 Commission staff has observed, "[T]he use of administrative orders with few due process protections, particularly against our own citizens, raises significant civil liberty concerns and risks a substantial backlash." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING 50 (2004) [hereinafter 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH], *available at* http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

142. The OFAC did do some terrorism regulation before September 11. AEDPA, which Congress passed in the mid-90s, authorizes the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, to designate an organization as a Foreign Terrorist Organization ("FTO"). 8 U.S.C. § 1189(a) (2000). Designation as an FTO has significant consequences to an organization, its members, and its supporters, not least because of what the OFAC is then authorized to do—namely, freeze all assets of a FTO in or controlled by a U.S. financial institution. *See id.* Additionally, representatives and certain members of FTOs may be barred from entry into the United States, *see id.* § 1182(a)(3)(B), and may play a role if

In the following Subpart, we describe the regulatory regime that OFAC administers. That regime is designed to prevent terrorists from using property—originally, assets kept in regulated financial institutions, but now, any form of property—within the reach of Department of Treasury regulators.[143] It is a scheme that has turned regulators who tracked the assets of foreign countries with whom we were at war into regulators who grab the assets of individuals—often individual American citizens—who might wish us ill. In this Subpart, we consider some of the administrative problems that the new regulatory scheme has created.

1. The New Regulatory Scheme

Twelve days after September 11, the President issued an executive order declaring a national emergency and authorizing the Secretary of the Treasury to freeze the assets of groups or individuals that, among other things, "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism."[144] The President acted, he announced, "because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists."[145] The authority for these freezes came from the International Emergency Economic Powers Act ("IEEPA").[146]

Many of the powers granted to OFAC under IEEPA predated September 11, although September 11 prompted the agency to reinterpret these powers. The pre-September 11 IEEPA granted the President authority "to deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States, if the President

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the FTO's supporters find themselves facing criminal prosecution. *See* 18 U.S.C. § 2339B(a)(1) (2000).

143. In addition to serving as a financial regulator, the OFAC also issues export licenses and regulates some other aspects of the interaction between Americans and foreign nations with whom we are at, or close to being at, war. For background, see Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 336–40 (2005); R. Richard Newcomb, *Coping with U.S. Export Controls*, 844 PLI/Comm. 105, 109 (2002) (setting forth the former director's description of the agency).

144. Exec. Order No. 13,224 § 1(d)(i), 66 Fed. Reg. 49,079 (Sept. 23, 2001). For more background, see John B. Reynolds III et al., *Export Controls and Economic Sanctions*, 37 INT'L LAW. 263, 265 (2003).

145. Exec. Order No. 13,224, 66 Fed. Reg. at 49,079. As one federal banking official explained to Congress, the OFAC is acting "under presidential wartime and national emergency powers and authority granted by specific legislation to impose controls on transactions and freeze foreign assets under U.S. jurisdiction." *The Bank Secrecy Act and the USA PATRIOT Act Before H. Comm. on Int'l Rel.*, 108th Cong. (2004) (testimony of Herbert A. Biern, Senior Associate Director, Division of Banking Supervision and Regulation), *available at* http://www.federalreserve.gov/boarddocs/testimony/2004/20041117/default.htm.

146. 50 U.S.C. §§ 1701–06 (Supp. 2003).

declares a national emergency with respect to such threat."[147] IEEPA gave the President the ability to "freeze" the assets of nations with whom the United States is either at war or had designated to be a national enemy.[148] The statute also provided for the sanctioning of supporters and nationals of the enemy.[149]

The PATRIOT Act added to these powers the ability to "block" assets during the pendency of civil investigations into whether particular individuals, entities, or organizations were engaged in these activities.[150] The President claimed that the blocking power was necessary "because of the ability to transfer funds or assets instantaneously," meaning that "prior notice to [investigation targets] would render [OFAC's freeze powers] ineffectual."[151] The PATRIOT Act also permitted designations to be justified and defended in court with classified, ex-parte evidence in order to protect intelligence sources and methods from discovery by the targeted party.[152]

After September 11, the President announced the creation of a class of Specially Designated Global Terrorists ("SDGTs")—a bureaucratic move that he declared was "a major thrust of our war on terrorism" and a "strike on the financial foundation of the global terror network."[153] Executive Order No.

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147. *Id.* § 1701(a).

148. *Id.* § 1701 (a)(1)(c).

149. *Id.*; *see generally* Hon. Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459 (2005); Angela D. Hardister, *Can We Buy Peace on Earth?: The Price of Freezing Terrorist Assets in a Post-September 11 World*, 28 N.C. J. INT'L L. & COM. REG. 605 (2003).

150. 50 U.S.C. § 1702(a)(1)(B). Specifically, the PATRIOT Act amended the freezing and blocking powers of the OFAC to permit it to

> investigate, *block during the pendency of an investigation*, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Id. (emphasis added).

151. Exec. Order No. 13,224 § 1(d)(i), 66 Fed. Reg. 49,079 (Sept. 23, 2001).

152. *See* 50 U.S.C. § 1702(c).

153. *Bush "We will starve the terrorists,"* CNN.COM, Sept. 24, 2001, http://archives.cnn.com/2001/US/09/24/ret.bush.transcript/. Although SDGTs are the most common designation adopted by the government against terrorists, it is not the only one. Executive Order Number 13,224 also created a category of "specially designated terrorists," or SDTs, and before September 11—before the days when OFAC was freezing the assets of suspected individual terrorists—it developed a category of "foreign terrorist organizations" ("FTOs") in the 1990s, many of whom it is now recharacterizing as SDGTs. Exec. Order No. 13,224 § 1(d)(i), 66 Fed. Reg. at 49,079. The most recent version of the list is available on the OFAC's website. Office of Foreign Assets Control, Specially Designated Nationals, http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml (last visited Jan. 25, 2007). The PATRIOT Act

13,224 defined SDGTs to include foreign terrorists; anyone who "assist[s] in, sponsor[s], or provide[s] financial, material, or technological support for . . . or other services to or in support of" terrorism; and also agents or persons associated with these terrorists.[154]

But while the reach of the SDGT regulations is broad, making a case for an asset freeze is not correspondingly deep.[155] The initial freeze of assets and property is, as the 9/11 Commission staff put it, "contingent on the signing of a piece of paper"—a blocking order pending investigation—by the director of OFAC, a mid-level government official, without any further administrative process or review.[156] No warrant is required for the procedure, which, pursuant to the PATRIOT Act, is often initiated at the

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and new Executive Order added a new structure to an already extant counterterrorism financing regime. In 1995, President Clinton issued Executive Order 12,947, pursuant to the IEEPA, which designated certain terrorist organizations "Specially Designated Terrorists" and blocked all of their property and interests in property. Exec. Order No. 12,947, 60 Fed Reg. 5079 (Jan. 23, 1995). The order also allowed for additional designations if an organization or person were found to be "owned or controlled by, or to act for or on behalf of" a specially designated terrorist. *Id.* The State Department handled FTO designations, though all FTOs have since been designated as SDGTs as well. For an overview, see Nicole Nice-Petersen, *supra* note 140, at 1387–90.

154. Exec. Order No. 13,224 § 1(d)(i), 66 Fed. Reg. at 49,079; *see also* Nina J. Crimm, *High Alert: The Government's War on The Financing Of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1370–73 (2004); Nina J. Crimm, *Post-September 11 Fortified Anti-Terrorism Measures Compel Heightened Due Diligence*, 25 PACE L. REV. 203 (2005) (reviewing developments in the financial regulation of terrorism, with particular attention to the compliance required by regulated industry).

155. As Mariano-Florentino Cuéllar has noted, "Even when executive branch officials discuss asset freezes, they describe the basis for an asset freeze as merely a 'belief' (which is consistent with the broad discretion provided by the statute)." Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 38 n.90 (2004).

156. 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 112 ("This provision lets the government shut down an organization without any formal determination of wrongdoing. It requires a single piece of paper, signed by a midlevel government official."). To be sure, OFAC officials describe the designation process as subject to some degree of internal review. As the agency's director testified to Congress,

> A completed OFAC evidentiary record on a particular target is submitted first for legal review, then to the Executive Office of Terrorist Finance and Financial Crimes, where OFAC officers work with that office to prepare the package for the Policy Coordinating Committee (PCC). The PCC determines whether the USG should designate a particular entity or should pursue alternative legal or diplomatic strategies in order to achieve U.S. interests. As part of the PCC process, OFAC's designation proposal will usually be vetted by the consultative parties specified by the EO [No. 13,224].

Oversight of the Department of Treasury: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services, 108th Cong. (June 16, 2004) (prepared statement of Richard Newcomb, Director, Office of Foreign Assets Control, Dep't of Treasury) [hereinafter Newcomb Testimony], *available at* http://www.ustreas.gov/press/releases/js1729.htm.

outset, rather than the culmination, of an investigation into whether SDGT targets are associated with terrorism.[157]

The remedy for those whose assets have been blocked during the pendency of an investigation lies in administrative or judicial review of the designation order.[158] But the preliminary nature of the government action, the arbitrary-and-capricious standard of review of agency "freezures,"[159] the overlay of deference in national-security matters, and the ability of the agency to keep much of the record for review classified, makes review likely to fail.[160] We are aware of no cases where plaintiffs have successfully challenged a designation and an OFAC blocking order since the advent of the war on terror.[161] Reviews of OFAC's post-investigation actions have a more checkered history in the courts—it is then that SDGTs can bring claims challenging the legality and sufficiency of the designation—but there,

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157. *See, e.g.*, Global Relief Found., Inc. v. O'Neill, 315 F.3d 748, 750 (7th Cir. 2002). In this case, the court noted,

> On December 14, 2001, the Secretary used the delegated authority to block all assets of Global Relief Foundation, Inc., an Illinois charitable corporation that conducts operations in approximately 25 foreign entities. . . . [T]he blocking order was an interim step pending investigation. The freeze on December 14 was accompanied by a search of GRF's headquarters.

Id. Testimony Before the S. Comm. on Banking, Housing and Urban Affairs, 109th Cong. (Sept. 12, 2006) (testimony of Adam J. Szubin, Director, Office of Foreign Assets Control, U.S. Dept. of the Treasury), *available at* http://www.ustreas.gov/press/releases/hp92.htm ("In February 2004, federal agents executed a search warrant on Al Haramain, pursuant to a joint investigation by IRS-CI, the FBI, and DHS/ICE. Simultaneously, Treasury's OFAC blocked the accounts of the organization pending investigation, freezing the organization's assets in place."); *see also* OFAC Recent Actions, http://www.ustreas.gov/offices/enforcement/ofac/actions/ (last visited Jan 25, 2007) (listing, among other actions, "blocked pending investigation," or BPI, actions between 2000–2006).

158. *See* Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003) (describing the standard of review of designation decisions).

159. They are "freezures" because the government seems to seize the asset, but, as the government has argued, not in a way that implicates the Fourth Amendment's search and seizure provisions because it does not search the property it has frozen. Holy Land Found. for Relief and Dev. v. Ashcroft, 219 F. Supp. 2d 57, 78–79 (D.D.C. 2002).

160. Indeed, the OFAC has taken the position that blocking orders pending investigation are not final agency action ripe for review. *Global Relief Found*, 315 F.3d at 751 ("[A]ppellees' suggestion of mootness is that GRF's current requests are limited to its status pending final administrative resolution."). In a similar vein, the viability of novel constitutional claims that defendants may be able to dream up makes judicial review problematic.

161. As the district court noted in the *Holy Land Foundation* litigation, "If [OFAC's] reasons and policy choices . . . conform to certain minimal standards of rationality . . . the rule is reasonable and must be upheld." *Holy Land Found.*, 219 F. Supp. 2d at 67; Islamic Am. Relief & Dev. v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 45 (D.D.C. 2005) ("This Court recognizes that the plaintiff is at an inherent disadvantage as it is not able to review and analyze the administrative record in its entirety, but rather is limited only to those portions of the administrative record that are not classified."). For an example of the kinds of claims that charities have raised against the OFAC, see Complaint at ¶¶ 39–48, Benevolence Int'l Found., Inc. v. Ashcroft, 200 F. Supp. 2d 935 (N.D. Ill. 2002) (No. 02 C 0763), *available at* http://files.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/bifashcroft013002cmp.pdf.

too, OFAC enjoys the benefits of deferential Administrative Procedures Act ("APA") review.[162]

Since September 11, OFAC has issued a regular series of lists of SDGTs and their alleged supporters.[163] As of 2004, the agency had designated 375 individuals or entities as SDGTs.[164] In the four months that followed September 11 alone, the agency listed 157 suspects and froze assets valued at $68 million.[165] By 2004, Treasury Department officials were crowing that they had frozen $200 million in assets since September 11.[166]

Perhaps most notably, the Treasury announced investigations of a number of charities based in the United States and subsequently froze all of their property. Because these actions against charities were high-profile and particularly big-dollar asset freezes, we use OFAC's record against charities as a yardstick for evaluating the effectiveness of this civil administrative mechanism of terror-fighting.

2. Inexpertise

The sort of regulation that OFAC has been called upon to do since September 11 is nothing like the regulation that the office was created to implement. The agency began as an administrative office that distributed export licenses and ensured that banks did not release the assets of foreign countries with whom the United States was at war.[167] It was created after World War II to enforce the dictates of the Trading with the Enemy Act ("TWEA")[168]—and had, until the 1990s, defined "enemy" as nations with

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162. *Holy Land Found.*, 333 F.3d at 162 ("[T]he actions of the Treasury Department in designating HLF as a SDGT are governed by the judicial review provisions of the APA." (citing 5 U.S.C. § 706(2)(A) (2000))). Under that statute, the government receives particularly strong deference for national-security-related actions. *See, e.g.*, 5 U.S.C. § 553(a)(1) (2000) (exempting rulemaking done pursuant to "a military or foreign affairs function of the United States" from informal rulemaking requirements); *Id.* § 552(b)(1)(A) (exempting government-generated information "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" from disclosure requirements).

163. The OFAC lists its enforcement actions at http://www.treas.gov/offices/enforcement/ofac/actions/index.shtml.

164. Newcomb Testimony, *supra* note 156.

165. Kevin Johnson, *Fewer Terror Assets Frozen; "Lack of Urgency" Feared in Effort*, USA TODAY, Jan. 30, 2006, at A1. The pace of designation and asset freezes has since slowed somewhat, and annual freeze-order takes declined to $4.9 million in 2005. *Id.*

166. *Combating International Terrorist Financing: Joint Hearing Before the Subcomm. on Domestic and International Monetary Policy, Trade and Technology and the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 53 (2004) (statement of Honorable Juan Carlos Zarate, Assistant Secretary Terrorist Financing and Financial Crimes U.S. Dept. of the Treasury), *available at* www.ustreas.gov/press/releases/js1971.htm (claiming that the OFAC had "seized over $200 million of terrorist-related funds worldwide").

167. In its early history, the OFAC was described as "a minor Treasury Department bureau." Am. Airways Charters, Inc. v. Regan, 746 F.2d 865, 876 (D.C. Cir. 1982) (Greene, J., concurring).

168. As one commentator explained:

whom the United States was at war, either cold or hot.[169] OFAC oversaw the limits on trade with these nations and ensured that the assets of the adverse country located in the United States were not repatriated.[170] The office focused on states like Cuba. Between 1990 and 2003, OFAC conducted 10,683 Cuba-related investigations and imposed $8 million in fines between 1990 and 2003. By comparison, during the same period, OFAC conducted 93 investigations into terrorists and imposed only $9,425 in fines.[171]

But beginning in the 1990s, and rapidly accelerating after September 11, OFAC has shifted its focus from countries to individuals, most notably individuals and organizations inside the United States.[172] With OFAC's new responsibilities has come hypertrophied growth. Between 1986 and 2004, the office expanded from ten employees to 144, while its budget has increased from almost nothing to $22 million per year.[173] OFAC now blocks asset transfers of at least $1 million, and as much as $35 million, per week.[174] To assist OFAC, the Treasury has created an Office of Intelligence Analysis, which helps to prepare the cases on SDGTs.[175]

In placing new assets, including many non-financial assets, in the hands of financial regulators, this new scheme has put the agency in the odd position of overseeing—indeed, dispossessing—organizations and individuals that the government has concluded promote or support

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> The statutory basis for U.S. economic sanctions in the twentieth century dates back to the enactment of the Trading with the Enemy Act (TWEA) in 1917, six months after the United States entered World War I. As originally enacted, the TWEA gave the President broad powers in times of war to regulate or prohibit transactions involving property in which a foreign country or national thereof had any interest. The TWEA was subsequently amended in 1933 to give the President authority to exercise his TWEA powers in response to peace-time national emergencies.

Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 LAW & POL'Y INT'L BUS. 501–02 (1999); *see also* Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 336 (2002) (discussing the history of the scheme).

169. The United States also imposed sanctions pursuant to the foreign-policy-export-control authority contained in the Export Administration Act, 50 U.S.C. app. § 2401–20 (2000). *See* Marcuss, *supra* note 168, at 502 (discussing this statutory scheme).

170. For a history of the OFAC's sanctions regime, see Marcuss, *supra* note 168, at 501.

171. Laura K. Donahue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 379 n.349 (2006) (citing newspaper and government reports).

172. *See supra* notes 153–166 and accompanying text.

173. *See* David Ivanovich, *Oil-For-Food Fiasco Spotlights Agency, Secretive Unit of the Treasury Is Responsible for Keeping Economic Sanctions in Place*, HOUS. CHRON., Feb. 26, 2006, at A8, *available at* http://www.chron.com/disp/story.mpl/chronicle/3686135.html; Newcomb Testimony, *supra* note 156.

174. *See* Newcomb Testimony, *supra* note 156.

175. *See* U. S. Dep't of the Treasury, Office of Intelligence and Analysis, http://www.ustreas.gov/offices/enforcement/oia/ (last visited Jan. 24, 2007).

terrorism—or, at least, those who are worth investigating further for those reasons—and on prosecuting, rather than cooperating, with regulateds.[176]

The charitable cases exemplify the new responsibilities with which the agency has been tasked. Those responsibilities have placed the agency in the role of investigating ordinary Americans for links with terrorism, taking control of the property of those people it suspects might be so linked, and, in some cases, overseeing and running the property that it takes. It is all a very new role for banking regulators.

Three months after September 11, OFAC took over three Islamic charities, including the two largest in America. These three charities provided money to a diverse set of beneficiaries, including, of course, a number of worthy causes.[177] But not all the links the charities created with the Islamic world were suspicionless. The Holy Land Foundation was a principally Palestinian-oriented institution, and its critics accused it of supporting Hamas, a Palestinian organization linked with terrorism.[178] The director of the Benevolence International Foundation ultimately admitted to supplying non-military goods to Chechen and Bosnian rebels.[179] And the Global Relief Agency had been linked to the Taliban-controlled

176. "The actual effectiveness of the OFAC's regulatory programs . . . is much more dependant upon voluntary implementation and compliance with its rules by the regulated community than on the agency's own enforcement actions." Peter L. Fitzgerald, *Managing "Smart Sanctions" Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957, 964 (2002).

177. The charities focused most of their efforts on providing short and long-term relief to Muslim victims of natural disasters. *See* notes 157–62 (providing specific examples of the causes taken on by the Holy Land Foundation, the Benevolence International Foundation, and the Global Relief Foundation).

178. The Holy Land Foundation for Relief and Development was a charity headquartered in Richardson, Texas. Adam Lisberg, *FBI Probes 2 Muslim Charities in North Jersey; Looking for Links to Terror Groups*, THE REC. (Bergen County, N.J.), Oct. 6, 2001, at A18. The charity's main objective was to help Palestinian refugees in the Middle East, but it provided humanitarian aid and relief to individuals and communities (primarily Muslim and Arab) in other Middle Eastern countries and the United States. *Id.* For example, in 2000, the charity raised $13 million to help Turkish earthquake victims and Muslim refugees in Kosovo and Albania, while also operating food pantries in places like Paterson, New Jersey. *Id.*

179. The Benevolence International Foundation ("BIF") was a U.S. tax-exempt, not-for-profit organization whose stated purpose was to conduct humanitarian relief projects throughout the world. Press Release, U.S. Dep't of Treasury, Office of Pub. Affairs, Treasury Designates Benevolence International Foundation and Related Entities as Financiers of Terrorism (Nov. 19, 2002), *available at* http://www.ustreas.gov/press/releases/po3632.htm [hereinafter Treasury Designates]. The organization's website claimed to help "those afflicted by wars . . . providing short-term relief such as emergency food distribution, and then moves on to long term projects providing education and self-sufficiency to the children, widowed, refugees, injured and staff of vital governmental institutions." Rotten.com, Benevolence International Foundation, http://www.rotten.com/library/history/terrorist-organizations/b-i-f/ (last visited Feb. 15, 2007). The BIF was incorporated in Illinois on March 30, 1992, and has operated around the world, in places such as Bosnia, Chechnya, Pakistan, China, Ingushetia, and Russia. Treasury Designates, *supra*. On November 19, 2002, the group was classified as a terrorist group financier by the United States Department of Treasury. *Id.*

Afghanistan, among other countries.[180] Later, pending investigation, OFAC moved to freeze the assets of Al-Barakat, an organization primarily devoted to Africa, though the agency later acknowledged that it could find no evidence linking the organization to terrorism.[181] In 2004, OFAC froze the assets of the Islamic American Relief Foundation, an African-centered charity,[182] and the U.S. branch of the Al-Haramain Islamic Foundation, a Saudi charity.[183] Most recently, OFAC blocked, pending investigation, access to the assets of KindHearts, a Toledo charity.[184]

Each of these Islamic charities—all with multi-million dollar budgets and varied programs in a number of countries—had all of their property frozen, from bank accounts to offices and the supplies within them. In the Holy Land Foundation freezure, OFAC removed all of the furniture from the charity's offices.[185] In the case of the Benevolence International Foundation, OFAC seized personal computers as well as business records.[186] After designating Al-Barakat as a SDGT, as one Treasury Department official explained, "Treasury agents ended up shutting down eight al Barakat offices in the United States"—mistakenly, as it turned out.[187]

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180. The Global Relief Foundation ("GRF"), also known as Fondation Secours Mondial, or FSM, was an Islamic charity based in Bridgeville, Illinois until it was raided and shut down on December 14, 2001 and labeled a "specifically-designated global terrorist" by the U.S. Treasury Department in 2002. Press Release, U.S. Dep't of Treasury, Office of Pub. Affairs, Treasury Department Statement Regarding the Designation of the Global Relief Foundation (Oct. 18, 2002), *available at* http://www.ustreas.gov/press/releases/po3553.htm. Before being shut down, the group claimed its mission was to provide care, support, and relief to people in need throughout the world. *Id.*

181. For an analysis of the benighted Al-Barakat investigation, see 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 67–86.

182. Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F.Supp. 2d 34, 45 (D.D.C. 2005) (upholding designation of charity). The Islamic American Relief Agency was formerly called the Islamic Relief Agency (IARA). *Id.* at 39. For the government's announcement of its action against IARA, see Press Release, U.S. Dep't of Treasury, Office of Pub. Affairs, Treasury Designates Global Network, Senior Officials of IARA for Supporting bin Laden, Others (Oct. 13, 2004), *available at* http:// www.ustreas.gov/press/releases/js2025.htm, and for a critical analysis, see Al-Marayati, *supra* note 140, at 327.

183. Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1218 (D. Or. 2006).

184. Jihad M. Smaili, Council on American Islamic Relations, Statement by Kind Hearts (Feb. 23, 2006), http://www.cair-net.org/default.asp?Page=articleView&id=39012&theType=NB.

185. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 64 (N.D. Tex. 2002) ("OFAC . . . removed from HLF headquarters, all documents, computers, and furniture.").

186. Benevolence Int'l Found., Inc. v. Ashcroft, 200 F. Supp. 2d 935, 936–37 (N.D. Ill. 2002).

187. Jimmy Gurule, Under Sec'y of Treasury for Enforcement, Briefing to Foreign Press Center: Update on Tracking the Financial Assets of Terrorists: One Year Later (Sept. 9, 2002), *available at* http://fpc.state.gov/fpc/13337.htm.

This civil process became decidedly novel after OFAC officials had taken possession of the charities because they then had to operate them.[188] OFAC has had to decide whether to permit the charities that it has dispossessed to cover basic operating expenses like rent or attorneys' fees.[189] It has had to evaluate requests to apply the frozen funds to new charities, to decide whether to distribute religious literature impounded in the freezure,[190] and to venture into the housing market to satisfy the tax bills of those whose assets have been frozen.[191]

In freezing the assets of charities, OFAC did not move against financial institutions at all and found itself engaging in activities that looked a lot like criminal law enforcement, albeit without the usual protections of criminal procedure. The dramatic effect that it had on Muslim charities in America—all of the charities seized have been paralyzed—is attributable, in part, to the strange relationship between OFAC's civil powers and quasi-criminal responsibilities.

3. Overdiscretion

Inexpertise is not the only problem that OFAC has faced in administering its new rules. Observers, including the 9/11 Commission staff, have expressed concerns about the problems inherent in OFAC asset freezes due to their heavy effects and light process.[192] Because OFAC can destroy

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188. For example, the OFAC must decide whether to pay creditors of the charity. Pamela M. Keeney, Comment, *Frozen Assets of Terrorists and Terrorist Supporters: A Proposed Solution to the Creditor Collection Problem*, 21 EMORY BANKR. DEV. J. 301, 301–09 (2004) (noting that asset freezes prevent creditors of the freeze targets from collecting their debts).

189. *See* Complaint at 25–26, Benevolence Int'l Found., Inc. v. Ashcroft (N.D. Ill. 2002) (No. 02C 763); *see also* Anne Beck & Sylvia Tonova, Note, *No Legal Representation Without Governmental "Interposition,"* 17 GEO. J. LEGAL ETHICS 597, 598 (2004) (discussing Executive Order No. 13,304, which prohibited the contribution of services to those whose funds had been blocked, and the effect on attorneys representing such clients); Jill M. Troxel, Note, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship*, 24 REV. LITIG. 637, 640–51 (2005) (discussing OFAC regulations regulating the attorney-client relationship by expressly prohibiting some legal services and requiring a license for others).

190. *See* Complaint, at ¶ 9, Al-Haramain Islamic Found. v. Ashcroft, No. 06 CV 583MO (on file with the *Iowa Law Review*) (seeking distribution of "thousands of volumes of religious literature, including Qur'ans, written commentary on the life of the Prophet Muhammad, and other materials designed to explain Islam to both adherents and non-adherents").

191. Mark Freeman, *Seda Home Sold*, MAIL TRIB. (Medford, Or.), May 5, 2006, at 5, *available at* http://www.mailtribune.com/archive/2006/0505/local/stories/5maysedahousesold.htm.

192. 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 112. The staff report found:

> Although in practice a number of agencies typically review and agree to the action, there is no formal administrative process, let alone any adjudication of guilt. Although this provision is necessary in rare emergencies when the government must shut down a terrorist financier before OFAC can marshal evidence to support

any entity with its freeze-before-investigation powers, and because designation decisions are not subject to much review, the post-September 11 agency has become a case study in overdiscretion.

The broad discretion afforded to OFAC has been exacerbated by a failure of executive-branch supervision and an unwillingness to define its new regulatory powers with precision. The result has been freezures that have failed to result in counterterrorism prosecutions but that have negatively affected charitable donations by Muslims.[193]

It is not clear that OFAC's supervisors have been able to keep up with everything the agency has been doing in the post-September 11 explosion of its business. In October, the Government Accountability Office concluded that the Treasury Department "lacks meaningful performance measures to assess its terrorist designation and asset blocking efforts."[194]

Moreover, OFAC has not been willing to limit its discretion by providing guidance as to what exactly constitutes dealing with SDGTs—a degree of vagueness that has become a tradition with the agency.[195] As we will see, this vagueness has particularly burdened would-be Islamic donors who have expressed exasperation and confusion as to which charities are at risk for freezure orders.[196]

The results have been predictably unimpressive. Like most terrorist actions, the September 11 attack was a low-tech, inexpensive operation, and efforts to freeze the assets of charities that, at best, tenuously were linked to al Qaeda have been, at the very least, controversial.[197] The 9/11 Commission has explained that so far, the asset freezes that have been enacted

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> a formal designation, serious consideration should be given to placing a strict and short limit on the duration of such a temporary blocking.

Id.; *see also* Al-Marayati, *supra* note 140, at 334 (arguing that the freezes have victimized Muslims who had nothing to do with terror). For an early critique of the large discretion the OFAC was afforded in designations even before September 11, see Peter L. Fitzgerald, *"If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This": Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73, 110–15 (1999).

193. *Benevolence Int'l Found. v. Ashcroft*, *supra* note 186, only resulted in one non-terrorism-related guilty plea, see *supra* note 179 and accompanying text, while the Global Relief Foundation was never prosecuted. *See generally* Neil McFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES, Oct. 30, 2006, at A1 ("Office of Terrorism and Financial Intelligence at Treasury Dept has shuttered five major Muslim charities in US since 2001, seizing millions of dollars in assets, but not one officer or organization has been convicted of anything.").

194. Kevin Johnson, *supra* note 165, at A1 (quoting the GAO report).

195. Ivanovich, *supra* note 173 ("OFAC experts say the agency keeps its rules vague.").

196. *See infra* note 204 and accompanying text.

197. In the words of the Commission:

> Nothing the hijackers did would have alerted any bank personnel to their being criminals, let alone terrorists bent on mass murder. Their transactions were routine and caused no alarm. Their wire transfers, in amounts from $5,000 to $70,000, were utterly anonymous in the billions of dollars moving through the

> were undertaken with limited evidence, and some were overbroad, resulting in legal challenges. Faced with having to defend actions in courts that required a higher standard of evidence than was provided by the intelligence that supported the designations in the first place, the United States . . . [was] forced to "unfreeze" assets.[198]

The result of affording OFAC so much discretion to freeze assets—especially to freeze assets pending investigation—is that control over the important decisions to freeze has been delegated down. This putatively crucial component of the war on terrorism has been administered by mid-level bureaucrats in the Treasury Department who have been given the authority to interpret very broad grants of authority.

4. Fit

Although OFAC's conduct in the war on terror is most obviously a problem of inexpert banking supervisors taking on a law enforcement role, exacerbated by a failure to adequately constrain the agency, perhaps the most troubling aspect of the agency's fight against terrorism is the change in focus within the agency. Previously, it monitored a regulated industry to ensure that Cuba, North Korea, Vietnam, and other foreign powers did not make use of American financial institutions; now, its regulatory purview reaches far beyond banking.[199] As the post-September 11 executive order has made clear, OFAC now has the capacity to impose extraordinarily serious regulatory punishment on anyone, domestic or foreign, suspected of association with terrorists.[200] However, it is by no means clear that the agency's supervision of a regulated industry has made it capable of searching for elusive links with terrorism among not just regulateds, but all Americans.

5. The Effect on Proxies

OFAC's sanctions depend on a second-order form of regulation of terrorists that consists of imposing watch requirements on institutions that the terrorists might use. But it is unlikely that terrorists will use charities or banks in an open, public way, nor is it clear that terrorists need the ability to move and launder substantial funds through banks or other institutions.[201]

> international financial system on a daily basis. Their bank transactions, typically large deposits followed by many small ATM or credit card withdrawals, were entirely normal, especially for foreign students living in the United States. No financial institution filed a suspicious activity report (SAR) and, even with benefit of hindsight, none of them should have.

9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 53.

198. *Id.* at 47.

199. For the OFAC's history, see *supra*, notes 146–66.

200. *See supra* notes 144–54 and accompanying text.

201. *See infra* notes 246–48 and accompanying text (discussing terrorists' financial transactions).

Thus, OFAC has become a heavy-handed regulator of proxies for terrorists with little evidence of efficacy.[202] Two proxies in particular have been affected: Muslims and financial institutions.

The part of the public most burdened by the new OFAC designations has been American Muslims, who are obligated by their religion to give to charity, but who have found their donations after September 11 to be fraught with new risks.[203] The reaction of Islamic advocacy groups has been predictably negative.[204]

Moreover, as the number of individuals and organizations designated has grown, the record-keeping burdens on the banks—and, indeed, anyone who works with money[205]—have grown. On January 12, 2006, OFAC issued guidance to banks for compliance with its requirements. The guidance requires banks to implement internal controls for identifying suspicious accounts and transactions, including a set of written procedures for new accounts, old accounts, and all transactions; a testing process of the compliance program; the designation of a "compliance officer" responsible for the day-to-day oversight of the OFAC compliance program; and the creation of a training program.[206] The penalties imposed by OFAC for failure to comply with these requirements range from the low five figures to over one-million dollars.[207] Since 1993, OFAC has collected nearly $30 million for compliance program violations.[208]

OFAC's new guidance to financial institutions gives a sense of the amount of work banks are supposed to do to identify and find SDGT transactions. The Department of Justice has admitted that "OFAC sanctions are constantly changing and complex."[209] A laundry list of consultants—

202. *See infra* notes 210–16 and accompanying text for a discussion of the effectiveness of these regulations.

203. This charitable obligation is known as Zakat and is rooted in the Koran. For a discussion, see generally Al-Marayati, *supra* note 140.

204. *See, e.g.*, 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 111 (discussing this reaction); Sakeena Mirza & Ameena Qazi, *Robbing the Poor*, 12 AL-TALIB (Los Angeles), http://www.al-talib.com/articles/v12_i3_a04.htm (last visited May 25, 2007) (same).

205. This includes those who work informally with money. As the OFAC has said, "All U.S. persons must comply with the OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches." OFAC, Frequently Asked Questions, http://www.treas.gov/offices/enforcement/ofac/faq/shtml#1 (last visited May, 10, 2007). There are no de minimis transactions permitted with designated entities.

206. Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 31 C.F.R. § 103.140 (2006); *see also* Joel Feinberg, *OFAC Issues Interim Final Rule Describing Sound Compliance Program*, MONDAQ BUS. BRIEFING, Jan. 26, 2006, *available at* 2006 WLNR 1431613.

207. Newcomb Testimony, *supra* note 156.

208. *Id.*

209. Lester M. Joseph, *Anti-Money Laundering Update*, 1378 PLI/CORP 627, 656 (2003) (describing the OFAC regime by offering the perspective of a senior criminal prosecutor in the Department of Justice).

ranging from linguistic psychologists to computer-savvy data-miners—have tried to fill this gap by developing programs and training opportunities designed to help financial institutions keep track of the growing lists of individuals.[210] But such programs are, of course, expensive.

Moreover, compliance is not just an issue for financial institutions. It is also an issue for a broad array of domestic entities never before subject to the agency's control. Consider the difficulties of compliance with new guidance—rare guidance, for OFAC—to charities, the proxies that OFAC has regulated particularly severely in the hopes of catching terrorists. OFAC has suggested the adoption of a "risk-based" approach to the monitoring of charitable aid recipients.[211] Charities have been directed to conduct "due diligence" of their recipients (as well as of the charities' own personnel) to ensure that they are not on OFAC-generated watch lists, to provide donors with some information about the identities of their aid recipients and the use to which the aid will be put, and to continue to monitor recipients after the aid has been given.[212]

These putatively voluntary guidelines for charities, in imposing a number of reporting and bookkeeping requirements to ensure that they do not become conduits for terrorist money, are similar to the requirements OFAC imposes on more traditional subjects of its regulation, such as banks.[213] Furthermore, as with banks, the government has made no guarantees that compliance with the guidelines will exempt charities from prosecution for money laundering.[214] The department has also issued "best practices"[215] that charitable organizations might follow. This might create

210. Choicepoint is one of the best known data-miners. *But see also* OFAC Compliance, http://www.las-inc.com/ofac/ofac-compliance.shtml (last visited May 10, 2007) (asking whether financial institutions are "Struggling with Assessing OFAC Compliance Software" and offering the service of linguists and psychologists in the name-matching process).

211. *See* Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities, 70 Fed. Reg. 73,063, 73,063 (Dec. 8, 2005) (announcing an intention "to assist charities in developing a risk-based approach to guard against the threat of diversion of charitable funds for use by terrorists and their support networks"); *see also* Joseph W. Younker, *The "U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best-Practices for U.S.-Based Charities": Sawing A Leg Off the Stool of Democracy*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 865, 866 (2004) (calling for "a flexible, risk-based test more in tune with the reality of the nonprofit sector").

212. U.S. DEPT OF THE TREASURY, ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S.-BASED CHARITIES 6 (2006), *available at* http://www.ustreas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.

213. *Id.*

214. At any rate, the Department warned the charities that compliance with its guidelines should "not be construed to preclude any criminal or civil sanctions by the Department." *Id* at 1.

215. *Id.*

consistency across charities, but there is no indication that it would result in a particularly desirable regulatory regime.[216]

6. Conclusion

The Treasury Department continues to designate individuals under the SDGT process. Indeed, it has paired its domestic process with an international one, persuading the United Nations and American allies to also designate individuals and organizations as subjects of global asset freezes.[217] Still, it is worth considering the results of this new form of action by the Treasury Department so far.

It is unclear that any of the charities taken over by OFAC actually supported terrorism in any way other than incidentally and accidentally, if even that.[218] In no case have the charity "freezures" been followed by successful prosecutions for violating the criminal laws against terrorism—although one charity official pled guilty to providing nonmilitary goods to Chechen and Bosnian rebels, neither of which, of course, were responsible for the attacks of September 11.[219]

This is not surprising. As the 9/11 Commission staff explained, the earlier designation of al Qaeda and the Taliban in 1999 as "Foreign Terrorist Organizations" did not prevent the World Trade Center attack. As the Commission noted, "the sanctions . . . were easily circumvented," and it is surpassingly difficult to "find [ ] and seiz[e] the funds of a clandestine worldwide organization like al Qaeda."[220]

To the extent that the regulations are effective at all, their effectiveness probably lies primarily in the sense that the government is doing something about terrorism when it freezes assets through the low-cost, lightly reviewed designation process.[221] Sanctions like those administered by OFAC "are

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216. *See generally* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2006) (discussing best-practices rulemaking, its origins in business management, and an analysis of how it works in the public sector).

217. *U.S. Department of the Treasury Before the Senate Committee on Banking, Housing and Urban Affairs*, 108th Cong. (Aug. 23, 2004) (statement of Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence) [hereinafter Levey Testimony], *available at* http://banking.senate.gov/_files/ACF4BE6.pdf.

218. As the 9/11 Commission staff noted, "A senior government official who led the government's efforts against terrorist financing from 9/11 until late 2003 believed the efforts against the charities were less than a full success and, in fact, were a disappointment because neither charity was publicly proved to support terrorism." 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 111.

219. *See supra* note 179 and accompanying text.

220. 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 181.

221. As Mariano-Florentino Cuéllar has noted, in order to "appear [ ] to be doing something constructive to reduce a threat" an executive branch official may be tempted to use his "power regardless of whether there is the capacity to target the sanctions at the most deserving of targets" in the absence of the capacity to impose substantial costs on the most troubling offenders, or to detect them." Cuéllar, *supra* note 155, at 44, 46.

frequently imposed to demonstrate political leadership or to claim the moral high ground for domestic or international political purposes."[222] That process has also proven to be a surprisingly attractive means of obtaining international cooperation in that the United Nations and American allies have been willing to announce freezes of any assets of designated individuals located in their jurisdictions.[223] Ironically, these internationally focused benefits, meager though they are, are the aspects of terrorism-financing regulation most closely related to OFAC's original mission.

B. *FINCEN AND THE HIGH COST OF SEARCHING FOR MONEY LAUNDERERS*

The government has tried to prevent criminals from laundering their ill-gotten gains for decades, and this anti-money laundering regime has always been administered by banking regulators in the Department of the Treasury. In this Article, we have argued that civil administrative agencies usually fight the war on terror badly. Can this possibly be true for a government agency that has been running comparable civil investigations against criminals for decades?[224]

In our view, it is. While the regulation of banks to prevent money laundering is not a new administrative task, the post-September 11 regime illustrates the perils of the hasty expansion of regulation—a case of overreaction that has particularly exacerbated the problems of fit and overdiscretion that, along with the problem of inexpertise, typically characterize the results of sending bureaucrats to war. After September 11, banking regulators have rushed into a scheme that substantially affects a set of proxies for terrorists—financial institutions—without any indication that the terrorists themselves have been affected.

1. The Regulatory Scheme, and How It Changed After September 11

There was little that was secret about the Bank Secrecy Act of 1970 ("BSA"), which was passed to prevent tax evaders and criminals from hiding or laundering their taxable or ill-gotten assets in federally regulated banks.[225] In the years that followed, banks and other federally regulated financial

222. Fitzgerald, *supra* note 176, at 961.

223. *See* Laura Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 426 (2006) (noting that a number of states, along with the United Nations, have started designating individuals and warning that "[t]he United States' refusal to allow any sort of independent arbitration to accompany the creation of lists substantially weakened the UN attempt to build a dossier of dangerous individuals, and that the lack of such a structure opens the door to abuse from other states").

224. As some observers have claimed, "economic sanctions are frequently the government's first and principal tool to deal with international terrorism." Jonathan Grebinar, Note, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 FORDHAM URB. L.J. 261, 280 (2003).

225. *See* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 26–30 (1974) (discussing these and the other concerns Congress tried to address in the Bank Secrecy Act).

institutions were required to report to the Department of the Treasury on large or otherwise suspicious transactions.[226]

After September 11, the BSA was amended by the PATRIOT Act to expand the reach of the criminal sanctions against money laundering[227] to permit the Treasury Department to pursue civil penalties against alleged launderers[228] and, most notably, to increase the reporting requirements on, and broaden the definition of, financial institutions subject to the requirements of the Act.[229] Congressional leaders and executive officials claimed that these new laws were designed to stem the flow of money to terrorists.[230]

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226. For a description of the Financial Crimes Enforcement Network ("FinCEN") in the pre-September 11 era, see Steven A. Bercu, *Toward Universal Surveillance in an Information Age Economy*, 34 JURIMETRICS J. 383, 386–400 (1994).

227. Among other things, it expanded the number of predicate penalties for a money laundering charge, 18 U.S.C. § 1956 (Supp. 2005), and it criminalized the transportation of bulk cash, 31 U.S.C § 5311. It also made the operation of an unlicensed money-transfer business a general, rather than a specific, intent crime. 18 U.S.C. § 1960 (Supp. 1960). It added the provision of monetary support to the list of crimes under the anti-terrorism act.

228. *See* 18 U.S.C. § 1956(b) (Supp. 2005). Under this statute, any person who engages or attempts to engage in a transaction involving more than $10,000 in criminally derived proceeds may be held civilly liable for the value of the proceeds or $10,000, whichever is greater. The statute contains a long-arm jurisdiction provision, via which, a foreign "person" is now subject to jurisdiction for a forfeiture action, as long as personal service can be effected and one of the following conditions is met: (1) the money laundering offense involved a financial transaction that occurred in whole or part in the United States; (2) the foreign person (including a foreign bank) converts property in which the United States has an interest by virtue of a forfeiture order of a U.S. court; or (3) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States. *Id.*

229. For an exhaustive discussion of these new requirements, see Robert W. Helm & Kevin K. Babikian, *Creating, Managing and Distributing Offshore Investment Products: A Legal Perspective, in* NUTS AND BOLTS OF FINANCIAL PRODUCTS 2005, at 715, 964 (PLI Corp. Law & Practice, Course Handbook Series No. 6348, 2005) ("The USA PATRIOT Act required the Treasury Department to extend CTR reporting requirements under the [Bank Secrecy Act] to all trades and businesses—not just financial institutions."). The statue also permits federal authorities to share information with financial institutions about the potential targets of investigation. *See* 67 Fed. Reg. 60,579 (Sep. 26, 2002) (setting forth the implementing regulations for this process). FinCEN reports that it has processed 167 such requests for information by federal agencies between February 1, 2003, and December 6, 2005. Fin. Crimes Enforcement Network, Dep't of Treasury, FinCEN's 314(a) Fact Sheet (Dec. 6, 2005), http://www.fincen.gov/314afactsheet.12062005.html.

230. *See Financial War on Terrorism and the Administration's Implementation of the Anti-Money Laundering Provisions of the USA PATRIOT Act: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 2 (2002) (statement of Sen. Paul Sarbanes) ("The United States must lead both by example and by promoting concerted international action. Our goal must be not only to apprehend particular individuals, but to cut off the pathways in the international financial system along which terrorist and other criminal elements move money."); *id.* (statement of Representative John J. LaFalce) ("[T]he Treasury Secretary's new, more flexible anti-money laundering powers will enable law enforcement to tackle with much more effectiveness abuses of our financial system by criminals and terrorists"); *id.* (statement of the Honorable Michael Chertoff, Assistant Attorney General, Criminal Division, Department of Justice) ("Title III of the USA PATRIOT Act has provided law enforcement with important new

The result has been a repurposing of the part of the Treasury Department that implements the money laundering regulations. The Financial Crimes Enforcement Network, or FinCEN, has been transformed from an office that tracked the financial transactions of criminals into one that looks, in principal part, for similar transactions by terrorists.[231]

FinCEN has implemented this new regulatory mandate by scrutinizing the reports and recordkeeping of banks and other financial institutions.[232] In theory, it looks for a financial trail that will lead investigators and prosecutors to terrorists.[233] But in practice, much of what the agency does involves the policing of the report-filing programs of the financial institutions covered by the BSA and the PATRIOT Act.

Because the new regulatory regime substantially expanded the number of institutions subject to the money laundering reporting requirements, tracking the reporting is a big job. The PATRIOT Act and its implementing regulations expanded the number of financial institutions subject to reporting requirements, which for the first time covered credit unions, futures commission merchants, commodity trading advisors, commodity pool operators, and informal or unlicensed transmitters of money.[234] That last category means that BSA reporting requirements now apply to pawnbrokers, loan circles, hawalas, and, possibly, any other person who

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authority to investigate and prosecute the financing of crime, including terrorism."). For more background, see *United States v. Wray*, No. CR. 2002-53, 2002 WL 31628435, at *2 n.5 (D. Virgin Islands June 17, 2002).

231. Treasury Order No. 105-08. In May 1994, its mission was broadened to include regulatory responsibilities. For more views on money laundering, see generally Michael P. Malloy, *Unfunding Terror—Perspectives on Unfunding Terror*, 17 TRANSNAT'L LAW. 97 (2004); Bruce Zargaris, *The Merging of the Counter-Terrorism and Anti-Money Laundering Schemes*, 34 LAW & POL'Y INT'L BUS. 45 (2002).

232. In this regard, FinCEN's work is concentrated on combining information reported under the BSA with other government and public information. This information is then turned over to law-enforcement officials, with the idea being that they can then build money-laundering cases with that information. For an enthusiastic characterization of what the agency is up to, see generally Cristina Jackson, *Combating The New Generation of Money Laundering: Regulations and Agencies in the Battle of Compliance, Avoidance, and Prosecution in a Post-September 11 World*, 4 J. HIGH TECH. L 139 (2004). Jackson states that

> FinCEN also provides intelligence and analytical support to law enforcement: it combines the reported information with information gathered from other government origins and from the public to construct intelligence reports for its customers . . . Its analysts provide direct and indirect case support to more than 300 federal, state, and local law enforcement agencies.

Id. at 150–51 (citations omitted).

233. FinCEN declares that its mission includes "*[s]upporting* law enforcement, intelligence, and regulatory agencies through sharing and analysis of financial intelligence." FinCEN, U.S. Dep't of Treasury, About FinCEN/Mission, http://www.fincen.gov/af_mission.html (last visited May 10, 2007).

234. 31 U.S.C. § 5312(a)(2)(E), (c)(1)(A) (2003).

loans money to someone else.[235] Loan and finance companies are also expressly covered.[236] Moreover, the statute gives authority to the Treasury Department to expand further the types of institutions covered by the reporting requirements.

Those subject to the Act's reach must file Suspicious Activity Reports ("SARs") with the Department of the Treasury.[237] Also, all financial institutions must establish anti-money laundering programs, including, as one Department of Justice attorney has explained, "at a minimum, the development of internal policies, procedures, and controls; the designation of a compliance officer; an ongoing employee training program; and an independent audit function to test programs."[238]

The Treasury Department has also issued specific minimum-standard "know your customer" regulations pursuant to the PATRIOT Act. These regulations require financial institutions to make "reasonable and practical" efforts to verify new customers, maintain records of the information used to verify them, and consult the lists of terrorists promulgated by OFAC.[239] Nor are these the only requirements that FinCEN has imposed on banks since the promulgation of the PATRIOT Act.[240]

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235. The Act explicitly applies to "underground banking systems," which it defines as "a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage in a business in facilitating the transfer of money . . . outside the conventional financial institutions system." USA PATRIOT Act, Pub. L. No. 107-56, §359(c), 115 Stat. 272, 328–29 (codified at 31 U.S.C. § 5318 (2001)).

236. 31 U.S.C. § 5312(a)(2), (c); Jeffrey P. Taft & Christina A. LaVera, *The Changing Landscape of Federal Money Laundering Laws: An Overview of the USA Patriot Act and Related Development*, 57 CONSUMER FIN. L.Q. REP. 109, 111 (2003) (describing the implementation of this provision of the statute).

237. The Treasury Department has the authority to define financial institutions pursuant to 31 U.S.C. § 5312, which includes its own broad definition of the term. The statute itself provides that "each financial institution shall establish anti-money laundering programs, including, at a minimum—

(A) the development of internal policies, procedures, and controls;
(B) the designation of a compliance officer;
(C) an ongoing employee training program; and
(D) an independent audit function to test programs."

31 U.S.C. § 5318(h).

238. Joseph, *supra* note 209.

239. 31 U.S.C. § 5318(h). For more on the Customer Identification Program, see Taft & LaVera, *supra* note 236, at 111.

240. For example, financial institutions are also now required to file Currency Trading Forms to report transactions "relating to coins and currency received" as well. *See* William J. Sweet, Jr., Saul M. Pilchen, & Stacie E. McGinn, *Summary of the USA Patriot Act of 2001 Anti-Money Laundering Provisions*, *in* MONEY LAUNDERING UPDATE 2002: WHAT YOU NEED TO KNOW 92 (PLI Corp. L. & Prac., Course Handbook Series No B-1337, 2002). On November 3, 2005, pursuant to § 356 of the USA PATRIOT Act, FinCEN issued regulations requiring insurance companies to establish and implement anti-money-laundering compliance programs and requiring insurance companies to file suspicious activity reports ("SARs"). For a discussion, see Anti-Money Laundering, http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=

Complying with FinCEN's regulatory regime, as was the case with OFAC's scheme, is an involved process. The result is a cottage industry of compliance consultants who offer software systems to track transactions, outside training sessions, and experts who can advise covered financial institutions as to what they must do to meet the Treasury Department's standards.[241] U.S. banks spent about $125 million both in 2003 and 2004 to comply with FinCEN's regulatory scheme. High-end estimates have placed the total costs of the money-laundering laws as $7 *billion* in 2003.[242]

2. Fit

But all of this civil regulation has done little to affect the fundamentally non-civil nature of terrorism. We have used the term "fit" to show how the characteristic form of civil rules—broadly applicable and dependent upon voluntary compliance—are ill-suited for counterterrorism. FinCEN's counterterrorism regime exemplifies the problems of fit because it has not done much good. There is little evidence that the new administrative regime has affected much of the money laundered:[243] federal convictions for money laundering have not increased,[244] and investigations have a failure rate of 99.9%.[245]

As with OFAC's freezes, none of this is at all surprising. The 9/11 Commission staff concluded that "al Qaeda itself probably did not use the formal financial system to store or transfer funds internally after Bin Ladin

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646 (last visited May 10, 2007); see also Press Release, FinCEN, Insurance Companies Required to Establish Anti-Money Laundering Programs and File Suspicious Activity Reports (Oct. 31, 2005), *available at* http://www.fincen.gov/newsrelease10312005.pdf. For the SARS themselves, see FinCEN Advisories, http://www.fincen.gov/pub_main.html (last visited May 10, 2007). The Treasury Department can also add to these reporting requirements in the cases where it is particularly suspicious of a pattern of overseas money laundering. In such cases, it can order domestic financial institutions to take "special measures," imposing additional tracking requirements to the paper generated by these suspicious accounts.

241. For a description of this process, see *supra* notes 206–16 and accompanying text.

242. *See* Karen Epper Hoffman, *AML Security Emphasizes Detection and Prevention*, BAI, Jan./Feb. 2005, http://bai.org/bankingstrategies/2005-jan-feb/aml/ (noting the high costs noted by banks); Daniel J. Mitchell, *Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis*, 25 PACE L. REV. 219, 222–23 (2005) (discussing observers who peg the cost at $7 billion).

243. *See* Mitchell, *supra* note 242, at 223 ("The key question, of course, is whether these costs are matched by concomitant benefits. The answer almost certainly is no. As indicated in the preceding paragraph, the government seizes very little dirty money.").

244. *See id.* (observing that "there are only about 2,000 convictions for federal money laundering offenses each year, and that number falls by more than 50 percent not counting cases where money laundering was an add-on charge to another offense," and noting that convictions had not increased (citing PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY 108–13 (2004))).

245. *See id.* (citing Lucy Komisar, *Offshore Banking: The Secret Threat to America*, DISSENT, Spring 2003, http://dissentmagazine.org/article/?article=505).

moved to Afghanistan."[246] And Christina Jackson has observed that "enforcement systems designed to unearth the large scale transfers used by money launderers and drug traffickers are not as adept at identifying the 'small routine transactions of terrorist cells.'"[247]

The likelihood that these reporting requirements will help to catch a terrorist is very low. As the 9/11 Commission staff explained, "For terrorist financial transactions, the amount of money is often small or consistent with the customer's profile (such as a charity raising money for humanitarian aid) and the transactions seemingly innocuous. As a consequence, banks generally are unable to separate suspicious from legitimate transactions."[248]

3. Overdiscretion

The radical expansion of FinCEN's administrative scheme has created new opportunities for the agency to impose penalties on financial institutions that have failed to meet every jot and tittle of the new requirements. Since September 11, FinCEN has imposed a staggering number of fines on banks for failing to meet its reporting requirements. Moreover, those fines have been extraordinarily large.[249] ABN AMRO, a large European bank, has been hit with a $30 million fine (and more from state regulators).[250] Western Union has also been hit with a $30 million fine for its record-keeping failures.[251] And the Department of Justice has brought criminal prosecutions for anti-money-laundering violations, which resulted

246. 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH *supra* note 141, at 25.

247. Jackson, *supra* note 232, at 161.

248. 9/11 COMMISSION TERRORIST FINANCING MONOGRAPH, *supra* note 141, at 52. Observers agree: "[B]oth developed and less developed states may find it difficult to regulate some financial transactions because substitute can be used to achieve them."). Cuéllar, *supra* note 155, at 20.

249. For a list of these fines, not all of which, of course, were related to terrorism, but a great number of which were related to recordkeeping, see Aquilan, Anti-Money Laundering Solutions, What Actions Has FinCEN Taken to Enforce the USA PATRIOT Act and Bank Secrecy Act?, http://www.aquilan.com/documents/Recent%20FinCEN%20Actions.pdf (last visited May 10, 2007); Aaron R. Hutman, Matthew J. Herrington, & Edward J. Krauland, *Money Laundering Enforcement and Policy*, 39 INT'L LAW. 649 (2005) (noting significant enforcement actions).

250. In the consent decree, ABN AMRO and the government agreed that "the New York Branch of ABN AMRO filed incomplete or inaccurate suspicious activity reports." In the Matter of the New York Branch ABN AMRO Bank N.Y., No 2005-5 (FinCEN Assessment of Civil Money Penalty Dec. 19, 2005), at 7, http://www.federalreserve.gov/boarddocs/press/enforcement/2005/20051219/1219attachment3.pdf; In the Matter of ABN AMRO Bank N.V. et al., FRB Dkt. No 050035-CMP-FB (Board of Governors of the Federal Reserve Board Order of Assessment of a Civil Money Penalty (Dec. 19, 2005)), http://www.federalreserve.gov/boarddocs/press/enforcement/2005/20051219/12905attachment2.pdf.

251. In the Matter of Western Union Financial Services, Inc. No 2003-02 (FinCEN Assessment of Civil Money Penalty with Undertakings Mar. 6, 2006), http://www.fincen.gov/western_union_assessment.pdf (assessing fines for, inter alia, failure to adequately file suspicious activity reports).

in a $50 million civil monetary penalty against AmSouth and $43 million in combined criminal and civil fines against Riggs Bank, which put the bank out of business.[252]

The regulated industry, as one might imagine, has found the increased level of fines to be troubling. It has accused FinCEN of assessing the fines randomly and unpredictably and has sought more guidance from the agency on how it decides to assess fines and why it makes them so large.[253] As with OFAC, though, FinCEN has not been eager to limit its discretion to fine as it wishes.[254]

4. Inexpertise

Although the Treasury Department has tried to prevent money laundering for some time, we see two ways in which the new anti-terrorism scheme has failed to make use of that expertise—even apart from the question as to whether trying to prevent terrorists from laundering money makes sense as a civil administrative scheme at all.

First, it is by no means clear that the government can handle all of this new data. The recent intensification of the reporting regime has overwhelmed the Treasury Department with paper. Some twelve-million reports are filed on transactions over $10,000 every year.[255] As of June 30,

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252. *See* In the Matter of AMSouth Bank, No. 2004-2 (FinCEN Assessment of Civil Money Penalty Oct. 12, 2004), http://sec.edgar-online.com/2004/10/12/0000891836-04-000358/Section9.asp (finding, among other things, that "AmSouth failed to develop an anti-money laundering program tailored to the risks of its business and reasonably designed, as required by law, to prevent the Bank from being used to launder money and finance terrorist activities and to ensure compliance with the Bank Secrecy Act"); John F.Cooney, *The Hazards of Enforcing Guidance*, ADMIN. L. & REG. NEWS, Winter 2006, at 2, *available at* http://www.venable.com/docs/pubs/1428.pdf. The government's 2005 Money Laundering Threat Assessment reported that "Riggs National Bank was fined over forty million dollars as a consequence of serious deficiencies in its AML program, including in its private banking practice," which included loans to "politically exposed persons, accepting millions of dollars in deposits under various corporate and individual account names and paying little or no attention to suspicious activity in these accounts." MONEY LAUNDERING TRADE ASSESSMENT WORKING GROUP, U.S. MONEY LAUNDERING THREAT ASSESSMENT 13 (2005), *available at* http://www.ustreas.gov/press/releases/reports/js3077_01112005_MLTA.pdf; *see also* Timothy O'Brien, *Regulators Fine Riggs $25 Million*, N.Y. TIMES, May 14, 2004, at C1 ("The fine stems from Riggs's failure over at least the last two years to actively monitor suspect financial transfers through Saudi Arabian and Equatorial Guinean accounts held by the bank. The accounts are still being scrutinized as possible conduits for terrorist funds or for the proceeds of graft.").

253. *Testimony Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services and the Subcomm. on International Terrorism and Nonproliferation of the H. Comm. on International Relations*, 109th Cong. (May 4, 2005) (statement of John Byrne, Chairman, American Bankers Ass'n) [hereinafter Byrne Testimony], *available at* http://www.aba.com/NR/rdonlyres/CDA74BEE-3E41-42D4-B7E0-C32E94B32D07/39275/AMLTestimonyJBMay2005.pdf.

254. *See supra* notes 192–98 and accompanying text.

255. Letter from Charlotte M Bahim, Senior Vice President, Regulatory Affairs, American Community Bankers, to Jennifer Johnson, Secretary, Board of Governors of the Federal Reserve System (May 6, 2005), *available at* http://www.americascommunitybankers.com/government/

2005, over 2.6 million Suspicious Activity Report ("SAR") forms had been filed with FinCEN.[256] The suspicious activity reports that are the focus of the post-PATRIOT Act regime have also exploded in number: "[F]ilings in the first six months of 2005 increased 45% over those filed in the same period of 2004" for depositary institutions alone.[257] "The volume of SAR filings in 2003 was 453% higher than those filed in 1996."[258] As the chair of the American Bankers Association testified to Congress, banks filed 43,000 such reports with OFAC in March 2005—a forty percent increase over the prior year.[259] There is no indication that FinCEN, even a FinCEN that has expanded precipitously since September 11, knows how to manage all of these reports.[260] In fact, the former director of FinCEN complained in 2004 that too many of these SARs were being filed by banks.[261] The haphazard nature of the fines that FinCEN has imposed has led some observers to question whether the agency has a policy in place to sort through each of the reports.[262]

Second, the broad scope of the new regulations suggests not an agency applying old skills to new areas but an agency that may be engaged in regulatory empire-building. FinCEN has not only imposed a broad new laundry list of reporting requirements on financial institutions after September 11, but it has also "encourage[d] further cooperation" among financial institutions in preventing terrorists from laundering funds. The complexity, detail, and public–private nature of the regulatory scheme has expanded FinCEN's reach beyond its traditional regulatory purview.[263]

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scripts/government_view_comment.asp?ID=1142 ("Financial institutions have filed over 12 million CTRs [currency transaction reports] each year since 1995.").

256. Financial Crimes Enforcement Network, United States Dep't of Treasury, 5 THE SAR ACTIVITY REVIEW: BY THE NUMBERS Feb. 2006, at 1, *available at* http://www.fincen.gov/sars/sars_by_numb_issue5.pdf.

257. *Id.*

258. Financial Crimes Enforcement Network, United States Department of Treasury, 2 THE SAR ACTIVITY REVIEW: BY THE NUMBERS, May 2004, at 1, *available at* http://www.fincen.gov/bythenumbersissue2.pdf.

259. Byrne Testimony, *supra* note 253.

260. As one banker has wondered, "We've got all of this data; how much actually led to something? That's a question all of us have. After all this effort and all these resources, what success have we had?" Annie Baxter, *Personal Information Becomes Post-9/11 Target* (Marketplace public radio broadcast Sept. 8, 2006) (quoting Bill Patient, Compliance Officer of BankCherokee of Minnesota), *available at* http://marketplace.publicradio.org/shows/2006/09/08/PM200609086.html.

261. *See* Hutman et al., *supra* note 249, at 654.

262. As one former FBI agent has stated, "You can be buried in an avalanche of information. . . . The total volume of activity makes it very difficult to track and trace any type of specific information." John Berlau, *Show Us Your Money*, REASON (Los Angeles), Nov. 2003, at 22 (quoting former FBI agent Oliver Revell).

263. Mariano-Florentino Cuéllar, *Notice, Comment, and the Regulatory State: A Case Study from the USA PATRIOT Act*, 28 ADMIN. & REG. L. NEWS, Summer 2003, at 3. As Cuéllar observed elsewhere, "the rule is one that applies to virtually anyone in the country, . . . and . . . the statute

Finally, it is briefly worth noting that some observers question the enterprise of tasking financiers with anti-terrorism responsibilities—a job in which those being regulated are as inexperienced as the regulators. As Larry Cunningham has noted, there is "reason to doubt whether the tools auditors apply to old-fashioned financial statement audits work as well when applied in" non-traditional exercises such as "thwart[ing] terrorist financing."[264]

5. The Impact on Proxies

The new administrative procedures designed to combat money laundering are extraordinarily overbroad, requiring most money-related businesses to implement a complex reporting scheme on almost all of their income. In doing so, we see the problems of using civil administrative process—which is best suited for broad rules of general applicability—to root out terrorists uninterested in participating in an administrative scheme. The banking industry has paid a heavy regulatory price to comply with an administrative effort designed to identify the tiny—and possibly nonexistent—number of terrorists who are customers of that industry.

Compliance with the reporting requirements of the regulations demands millions of hours of bank-employee time, in addition to the hours of government officials who go through filed reports. The question, as always, remains whether the new regulations are likely to deter terrorists and thus worth the costs. A KPMG survey revealed that ninety-four percent of North American banks reported increased costs in complying with FinCEN's rules, with "one-third of those respondents saying their costs have more than doubled over the last three years."[265]

More generally, banking-industry representatives have complained that different banking regulators inconsistently supervise compliance with these programs[266] and that the multiple regulators involved in the process make

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gives the agency a lot of latitude with the rule." Cuéllar, *supra* note 155, at 32. In fact, the new regulations selected by the agency are designed, in his view, to facilitate financial institutions' disclosures of the accounts of people suspected of being involved in money laundering and terrorist financing to the Treasury Department. *See generally* 31 C.F.R. § 103 (2002).

264. Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 271 (2004).

265. Posting of Karen Epper Hoffman to Banking Strategies Blog, http://www.bai.org/cs/blogs/bankingstrategiesnews/archive/2005/01/13/505.aspx (Jan 13, 2005, 9:14 AM).

266. Byrne Testimony, *supra* note 253. One banker has estimated that implementing the new know-your-customer rules consume forty percent of his time. *See* Baxter, *supra* note 260 (quoting BankCherokee of Minnesota's compliance officer); *The Needle in the Haystack*, ECONOMIST, Dec. 12, 2002, *available at* http://www.economist.com/displayStory.cfm?Story_ID=1492146. The article notes:

> [B]ankers with long experience of financial crime say that many of the rules introduced since September 11th to keep terrorists out of the mainstream

for a complex regulatory regime.[267] This imposes a substantial burden on financial institutions, affecting their information systems, employee training, and strategic planning for the future—including possible mergers and acquisitions.

6. Conclusion

The question is whether it makes sense to use a civil scheme to track possible customers voluntarily under federal control of those institutions, even if those customers have no interest in furthering the federal regulatory scheme. This search for the needle in the haystack is a very costly one. Relying on civil officials to handle this massive effort to smoke out terrorists—who do not participate in high finance, at any rate—illustrates the damage that can be inflicted by broad regulations that attempt to reach the sort of people who would not comply anyway.

V. QUALIFICATIONS TO THE ANALYSIS

We now turn to a number of potential objections to our analysis: (A) that our blanket condemnation of civil administrative counterterrorism would preclude some efficient and effective rules from being enacted (the locked cockpit door rule objection); (B) that the substantial costs imposed by terrorist incidents justify mobilizing the administrative state even if that state is usually ineffective at identifying terrorists (the one-percent problem); (C) that our claims about fit do not accurately characterize everything the administrative state does (the organizational flexibility objection); and (D) that one advantage of generally applicable rules is that they reduce the risk

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financial system will not achieve their aim. And in the end, customers will pay more for banking, because of the high cost of making detailed checks.

Id.

267. It is not only FinCEN that is involved in the new regulatory process. The federal banking regulators (principally the Federal Reserve; the Office of the Comptroller of the Currency ("OCC"), itself technically a part of Treasury; and the Federal Deposit Insurance Corporation) have imposed reporting requirements on their regulated industries pursuant to the PATRIOT Act, as have the Security and Exchange Commission ("SEC"), New York Stock Exchange ("NYSE"), and National Association of Securities Dealers ("NASD"). Per the stock exchanges, all broker/dealers must implement an anti-money-laundering compliance program and must file suspicious activity reports ("SARs") that identify and describe transactions that raise suspicions of illegal activity. They also must establish certain procedures with regard to "correspondent accounts" maintained for foreign banks. *See* Joseph, *supra* note 209, at 661.

As for the banking regulators, the ability of financial institutions to merge is at stake. The USA PATRIOT Act amended the Federal Reserve Act and the Bank Merger Act to require federal banking regulators to consider "the effectiveness of" the bank or thrift "in combating money laundering activities, including in overseas branches" when the bank or thrift seeks to merge with another financial institution. 12 U.S.C. §§ 1842(c)(6), 1828(c)(11) (Supp. 2001). In connection with any bank or thrift merger, the appropriate agency must consider "[t]he effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities, including in overseas branches." *Id.* § 1828(c)(11).

of racial profiling or other undesirable narrow casting of counterterrorism efforts, while engaging many in a large government enterprise (the victory garden objection).

A. THE LOCKED COCKPIT DOOR OBJECTION

It is probably the case that among the vast variety of actions that the civil administrative state might take, some might deter terrorists and do so effectively. Our claim is not that it never makes sense to use the civil bureaucracy to combat terror—just that it almost never makes sense. We acknowledge, for example, the Federal Aviation Administration's ("FAA") rule requiring airlines to lock their cockpit doors so that passengers cannot get in during flight. The Aviation and Transportation Security Act, passed shortly after September 11, authorized the FAA to require reinforced, locked cockpit doors during flight on both domestic and international flights.[268] The agency duly passed a rule requiring the locked doors, noting that it was being enacted "in the wake of the September 11, 2001, terrorist attacks against four U.S. commercial airplanes."[269]

The FAA rule was one of general applicability, civil in nature, and may be a good idea. In fact, locked cabin doors might have prevented terrorists from reaching the cockpits of the planes they hijacked on September 11.[270] The FAA rule is thus the perfect example, so the argument goes, of using an ordinary agency to carry out an effective and efficient counterterrorism policy, and hence also the perfect counterexample to our claims.

We think that the cockpit door rule supports, rather than refutes, our argument, for we do not make the sweeping claim that no agency action can ever be effective against terrorism. To the contrary, the FAA rule is an example of that rare agency action that may be able to pass our three tests of fit, balance between discretion and oversight, and expertise. Rather than targeting a proxy group, the rule directly targets terrorists, who must be among the few who would attempt to illicitly open a cockpit door during flight. The new rule does not grant sweeping new powers to the agency nor change the overall balance between discretion and oversight in its procedures. Finally, rather than requiring the FAA to do something outside its area of expertise and beyond its ordinary goals and mandate, this rule

268. *See* Pub. L. No. 107-71, § 104, 115 Stat. 606 (2001). Section 104 required the administrator of the agency to regulate access to cockpits—if it was not already apparent that the agency had the requisite authority from its broad power to regulate the airplane industry to ensure flight safety.

269. Flightcrew Compartment Access and Door Designs, 67 Fed. Reg. 2112, 2112 (Jan. 15, 2002).

270. *See, e.g.*, Brian R. Wahlquist, *Slamming the Door on Terrorists and the Drug Trade While Increasing Legal Immigration: Temporary Deployment of the United States Military at the Borders*, 19 GEO. IMMIGR. L.J. 551, 582 (2005) ("[D]espite multiple hijackings of commercial airliners over the past few decades, little was done to reinforce cockpit doors until after September 11.").

called on the FAA to act within its expertise in overseeing airline standards and plane safety. Accordingly, because the tests of fit, discretion, and expertise are met, one would expect that the FAA rule might be an effective counterterrorism measure—or at least one that is not likely to undermine the agency's core mission.

It may, of course, be possible to conceive of other examples where civil administrative regulations can be designed to remedy the problems of fit, overdeference, and inexpertise, and where the burden on the public at large (in the case of the cockpit door rule, a burden on airlines to install locks and ensure that they are used) might be worth the cost of deterrence.

When this is the case, we are all for it. However, we do not think that there will be many examples of this sort of judicious use of civil administrative agencies. Our claim is a descriptive one, and thus may be tested empirically. Comprehensively doing so is beyond the scope of this Article, but we think that evaluations of every aspect of the civil bureaucracy's counterterrorism initiatives would reveal that the vast majority of them do not work—and we have offered a theory about why that might be the case.

B. THE ONE-PERCENT PROBLEM

The Vice President has suggested that the calamitous, if remote, risk of a major terrorist attack justifies high investments in the war on terror.[271] Some call this the one-percent doctrine,[272] and the idea for our purposes is that the one in one hundred risk of attack justifies the mobilization of civil administrative agencies to combat terrorism and the imposition of substantial burdens on non-terrorists because it is possible that this mobilization will prevent catastrophe.

It is of course possible to imagine a terrorist strike so horrific that almost any cost is worth paying to prevent it—so long, of course, as paying that cost will actually prevent the attack. But it is not at all clear that calling upon the civil bureaucracy to join the fight against terrorists will prevent future attacks or even measurably reduce the risk of attack, based on what we have seen so far. The false positives have been high, the expenses great, and the inefficiencies many. (The balance of effectiveness and efficiencies in

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271. The vice president identified this problem in

> November of 2001 when [he was] confronted with harrowing intelligence about Pakistani nuclear scientists sitting with (Osama) bin Laden. . . .The vice president [said] that we need to think about these low-probability, high-impact events in a different way . . . [that] [i]f there is a one percent chance that WMDs essentially have been given to terrorists, we need to treat it as a certainty.

Bill Glauber, *Q&A: Suskind on How Analysis and Action Split*, MILWAUKEE J. & SENTINEL, July 16, 2006, at 1 (quoting Ron Suskind).

272. *See generally* RON SUSKIND, THE ONE PERCENT DOCTRINE (2006) (documenting the administration's use of the one-percent policy).

the non-civil law enforcement context may be different, and we do not pretend to assess those costs here.) But the one-percent argument assumes that the government's bureaucratic counterterrorism initiatives will in fact be effective in preventing, or at least reducing the risk of, terrorism. And that is exactly the point that we contest.

By the same token, a one-percent assessment of the spectre of a terrorist attack in the United States seems far out of proportion to the frequency of the attacks that the country has actually experienced. Of course, this forecasting problem is one that may also be tested empirically, and we do not claim to do so in this Article. We would have hoped that our government, in making this argument in defense of its initiatives, would have felt compelled itself to provide some data in support of such sweeping claims. But in the absence of any evidence about the likelihood of future attacks, we think that while the specter of a terrorist attack may loom large, it is hardly an everyday occurrence. In such a setting, it is unlikely that the civil costs incurred by the repurposing of agencies towards fighting terror are worth it.

C. *THE AGENCIES-CAN-DO-ANYTHING PROBLEM*

We have characterized civil administration as a form of governance best suited to rules of general applicability and the regulation of volunteers. In doing so, we admit that we are painting with a broad brush; we make no claim that there is a Platonic ideal of an agency and that it necessarily involves rulemakings and adjudications of volunteers. It may be that at least some agencies can flexibly be reformed to handle atypical or idiosyncratic regulatory problems.[273] The problem is that they are not being so reformed, as exemplified by the examples we have given here. As with the cockpit door objection, our response to the organizational flexibility argument is twofold.

Here too we willingly qualify our claim: agencies are *rarely* good at fighting terrorism. We will not rule out the possibility that our civil bureaucratic agencies can be efficiently and successfully reformed to perform new terrorism-related tasks outside their areas of expertise, although we think that will only very rarely be the case. But, as with the cockpit door objections, in the rare cases that agencies can be efficiently reformed to perform counterterrorism related tasks in a way that will meet our three tests of fit, balance between discretion and oversight, and expertise, we are all for it.

Here, we suggest that perhaps the crucial test is that of expertise. Lawmakers might be able to find ways to enable a given civil agency to target terrorists rather than proxy groups and to strike an adequate balance between discretion and oversight. But for most counterterrorism tasks,

273. For one approach on how this might be done, see generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

expertise will be more readily found in agencies and amongst officials that deal with criminal matters or law enforcement, such as intelligence analysts and criminal investigators, rather than amongst bureaucratic officials like bank regulators and DMV employees. Here, as with the other objections, if we take the importance of expertise, fit, and adequate supervision seriously, we suspect that only a very few proposed reforms will meet these tests.

D. THE VICTORY GARDEN PROBLEM

The imposition of burdens on everyone in the war on terror is not wholly without appeal. Making all Americans suffer a bit more when they renew their drivers' licenses may help to unify the country behind an anti-terrorism policy and to reassure a worried public that something tangible is being done to prevent terrorism. It may activate a populace in the same way that victory gardens[274] and war bonds[275] have done in wars past—by convincing everyone that their subjection to administrative process at least means that they are doing their bit. Moreover, spreading the costs around reduces the likelihood of a particularly ugly cost of targeted counterterrorism: racial profiling.

We find the victory garden upside of sending the administrative state to war to be uncompelling. The psychological advantage of appearing to have done something, however ineffective, is not at all clear. As anyone who has ever chatted with their neighbor in an airport security line can attest, the American public is not so foolish as to be unable to distinguish potentially useful from hopelessly ineffective security measures, and it gets little satisfaction from participation in the latter. Victory garden proponents will look hard, in our view, to find any evidence that levels of American patriotism have received a boost from longer DMV lines.

Furthermore, while the risks of profiling in a more targeted war against terror are real,[276] there are other ways of targeting counterterrorism measures besides racial profiling. In particular, the inexpertise and overdiscretion problems we have identified do not lend themselves to resolution through profiling. Likewise, our proposals for change, such as the suggestion that security in the political process might be better served by improving FBI security checks than changing legal standards, do not rely on profiling measures.

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274. For an overview, see LEWIS A. ERENBERG & SUSAN HIRSCH, THE WAR IN AMERICAN CULTURE: SOCIETY AND CONSCIOUSNESS DURING WORLD WAR II, at 17 (1996).

275. *See, e.g.*, ANTHONY CRESCENZI, THE STRATEGIC BOND INVESTOR 18 (2002) ("War bonds were crucial not only for the role they played in financing the war but in the way they helped unify the nation. The sale of war bonds became a rallying cry.").

276. *See, e.g.*, R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1201 (2004) ("[C]ommentators continue to debate the fairness of the widespread detention, deportation, and prosecution of Arabs and Muslims for non-terrorism related offenses. That debate has focused partly on the issue of racial profiling.").

As for fit, the broad sweep and general applicability of the measures we have discussed here do not preclude the risk of racial profiling in enforcement. Under the new REAL ID Act mandates, for example, whose documents will be scrutinized more carefully by DMV employees, and which asylum applicants' credibility will be questioned by USCIS decision-makers? After all, the traffic laws are also rules that apply to the public at large, but police officers' decisions concerning whom to pull over, ticket, and search are notoriously tied to profiling.[277] Furthermore, racial profiling itself is subject to our criticism of fit as well. Precious few amongst the ethnic and religious minorities typically targeted for counterterrorism investigation in fact have links to terrorism, making racial profiling a similarly inefficient screening mechanism to the others we have identified here.

Moreover, the pretense of effective action that a civil administrative war on terror or a well-tended victory garden represents is hardly cost-free. Actions that do nothing to win a war may crowd out other actions that might work in a government scheme with scarce bureaucratic resources. And at any rate, the real costs imposed on proxies like financial institutions, charities, or people who would like to obtain asylum or drivers' licenses, in our view, exceed the intangible benefits of making people feel like something is being done.

In the end, we think the match of criminal-style law enforcement efforts to deal with the criminal-like law-evading efforts of potential terrorists better uses the potential of government action (and promises the test of criminal process at the end of the government action) than does the imposition of broad costs on everyone by mobilizing unconventional terrorism fighters in the bureaucracy.

VI. CONCLUSION

Administrative agencies like the Treasury Department have been unfit, inexpert, and unsupervised in their efforts to detect and deter terrorists under the PATRIOT Act, and the new measures introduced by the REAL ID Act are likely only to make matters worse by pushing more of our unrelated civil agencies into the fray. Indeed, the agencies we study in detail are hardly alone in developing expensive new anti-terrorism policies.

The FDA, for example, has joined them.[278] It is, according to a commissioner, "applying . . . more resources to counterterrorism in all areas

277. *See generally* David A. Harris, *The Stories, the Statistics and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

278. James T. O'Reilly, *Bombing Bureaucratic Complacency: Effects of Counter-Terrorism Pressures upon Medical Product Approvals*, 60 N.Y.U. ANN. SURV. AM. L. 329, 331 (2004) ("[T]he Food & Drug Administration, the National Institutes of Health (NIH), and the Centers for Disease Control and Prevention (CDCP) . . . [are each] large and complex public health bureaucrac[ies] and each has served a distinct, though interrelated, role in the war on terrorism."); Otesa Middleton, *FDA Grows to Counter Challenges of Terrorism*, WALL ST. J., Sept. 11,

of the agency,"[279] including the development of a new "Project Bioshield"[280] and the fast-tracking of an anti-terrorism vaccine approval process.[281] The Occupational Safety and Health Administration ("OSHA") advises employers on how best to defend against chemical,[282] biological,[283] and radiation[284] terrorism, and it requires them to address terrorist emergencies through its emergency response program.[285] The Federal Energy Regulatory Commission ("FERC"), a rate regulator, has limited access to its documents[286] and, pursuant to a new statute, set new rules for the

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2002, *available at* http://www.ph.ucla.edu/epi/bioter/fdagrows.html ("Since last year's terror and anthrax attacks, the Food and Drug Administration's staff has swelled to record levels . . . [including] a staff of 10,389, a 10% increase.").

279. Michelle Meadows, *The FDA and the Fight Against Terrorism*, FDA CONSUMER MAG., Jan.–Feb. 2004, *available at* http://www.fda.gov/fdac/features/2004/104_terror.html. The FDA's increased efforts generally have focused on "two defensive measures: preventing willful contamination of all regulated goods; and increasing the availability of medical products to prevent or treat injuries caused by biological, chemical, or nuclear agents." Lester Crawford, Jr. D.V.M., Ph.D., Prepared Remarks, *The Food and Drug Law Institute's 45th Annual Educational Conference Keynote Addresses*, 57 FOOD & DRUG L.J. 231, 231 (2002).

280. Project BioShield Act of 2004, Pub. L. No. 108-276, 118 Stat. 835. Project BioShield has three main measures: providing the NIH with new authorities to speed research and development in areas of medical countermeasure development; authorizing the use of unapproved medical products during emergencies; and mandating the government to maintain a stockpile of vaccines and other medical products to provide for the health security of the United States in the event of a bioterrorist attack or other emergency. *Id.* §§ 2–4.

281. As the FDA noted when it rapidly approved a child dose of an antidote for nerve-gas exposure, the agency "has placed a high priority in making available safe and effective countermeasures against potential terrorist attacks." Michael D. Greenberg, *Information, Paternalism, and Rational Decision-Making: The Balance of FDA New Drug Approval*, 13 ALB. L.J. SCI. & TECH. 663, 667–68 (2003) ("Concerns about terrorism are pressing a new set of regulatory reforms at the FDA, designed to speed the development pipeline for new products important to national security, and in recognition that such products may be formally untestable under the traditional FDA new product approval regime."); O'Reilly, *supra* note 278, at 332 (quoting Press Release, Food & Drug Admin., FDA Approves Pediatric Doses of Atropen (Jan. 30, 2003), *available at* http//fda.gov/bbs/topics/ANSWERS/2003/ANS01232.html).

282. U.S. Dep't of Labor, Safety & Health Topics, Chemical Terrorism, http://www.osha.gov/SLTC/emergencypreparedness/chemical_sub.html (last visited Jan. 25, 2007).

283. U.S. Dep't of Labor, Emergency Preparedness—Biological, http://www.osha.gov/SLTC/emergencypreparedness/biological_sub.html (last visited Jan. 25, 2007).

284. U.S. Dep't of Labor, Emergency Preparedness—Radiation, http://www.osha.gov/SLTC/emergencypreparedness/radiation_sub.html (last visited Jan. 25, 2007).

285. Employee Emergency Plans & Fire Prevention Plans, 29 C.F.R. § 1910.38 (2006).

286. Specifically, the FERC removed from the public viewing certain documents, such as oversized maps that detail the specifications of energy facilities licensed or certificated under Part I of the Federal Power Act, and § 7(c) of the Natural Gas Act. *See* Comm'n Opinions, Orders & Notices, Treatment of Previously Discovered Documents, 97 FERC ¶ 61,030 (Oct. 11, 2001), *available at* 2001 WL 1522251; *see also* Patricia McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL'Y 671, 684–85 (2003) (discussing FERC limiting access to information post-September 11).

distribution of gas[287] and oil—again, all in the name of the war on terror.[288] Even the U.S. Department of Housing and Urban Development ("HUD") has gotten into the anti-terrorism game. Pursuant to the Church Arson Prevention Act of 1996, HUD now guarantees loans made by financial institutions to assist § 501(c)(3) nonprofits that have been damaged as a result of arson—or terrorism.[289]

And these new initiatives are only part of the story. Although the new Department of Homeland Security has three primary missions—"prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur,"[290]—DHS has extended its terror-fighting mandate to anti-counterfeiting measures,[291] the Safe School Initiative,[292] and the regulation

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287. Interagency Agreement Among the Fed. Energy Regulatory Comm'n, U.S. Coast Guard, & Research, and Special Programs Admin. for the Safety and Security Review of Waterfront Import/Export Liquefied Natural Gas Facilities (Feb. 11, 2004), *available at* http://www.ferc.gov/industries/lng/safety/reports/2004-interagency.pdf (addressing FREC's regulatory authority). The FERC signed an interagency agreement with various agencies, including the Department of Homeland Security, to share information and analyses to jointly prepare Environmental Impact Statements ("EIS") and safety reports for all LNG terminals. *Id.*; *see generally* FED. ENERGY REGULATORY COMM'N, A GUIDE TO LIQUEFIED NATURAL GAS: WHAT ALL CITIZENS SHOULD KNOW (2006), *available at* http://www.ferc.gov/for-citizens/citizen-guides/citz-guide-lng.pdf.

288. *See* Suedeen G. Kelly, Comm'r Fed. Energy Regulatory Comm'n, Address to the Environmental Regulation, Energy, and Market Symposium, Address at the Duke Envtl. Law & Policy Forum Symposium (Nov. 19, 2004), *in* 15 DUKE ENVTL. L. & POL'Y F. 251, 256 (2004) (noting that the biggest issue that has come to light in the last year and a half since LNG activity has been progressing at FERC has been concern about terrorism on tankers and discussing how the Coast Guard actually has jurisdiction over the tankers); *Report of the Natural Gas Regulation Committee*, 25 ENERGY L.J. 217, 224–27 (2004) (discussing FERC's plan to protect the energy infrastructure in the wake of September 11); *Report of the Natural Gas Regulation Committee*, 26 ENERGY L. J. 259, 275–76 (2005) (discussing FERC activity regarding measures enacted to protect the critical energy infrastructure); Jim Rossi, *Moving Public Law out of the Deference Trap in Regulated Industries*, 40 WAKE FOREST L. REV. 617, 669 (2005) (suggesting that concerns over the relationship between terrorism and oil led to Congress's failed energy bill in 2003).

289. U.S. Dep't of Housing & Urban Dev., Section II: Assisted Housing, http://www.hud.gov/sec2.cfm (last visited Jan. 25, 2007).

290. SECURING OUR HOMELAND: U.S. DEP'T OF HOMELAND SECURITY STRATEGIC PLAN 3 (2004), *available at* http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spead.pdf.

291. As the Congressional Research Service has said,

> [A]nother matter extends to the capability of the Secret Service to maintain its traditional role in the enforcement of certain financial crimes, such as anti-counterfeiting. Such criminal conduct has also become more sophisticated and complex. And combating it may now have to compete with new higher priorities and expanded duties in other fields, most markedly in anti-terrorism.

CONG. RESEARCH SERV., HOMELAND SECURITY DEPARTMENT: FY2006 APPROPRIATIONS 40 (2005), *available at* http://www.fas.org/sgp/crs/homesec/RL32863.pdf.

292. U.S. Dep't of Homeland Security, Threats and Protections: Children and Schools, http://www.dhs.gov/dhspublic/display?theme=75 (last visited Jan. 25, 2007).

of telemarketing.[293] State and local governments have also been pressed into service in the anti-terrorism cause on both immigration[294] and other matters.[295]

Civil administrators should be encouraged to lay down their arms in the war on terror, pick up their collective bureaucratic pens, and turn back to the tasks they were intended to perform. For as we have seen, when these agencies pursue terrorists instead of developing their areas of expertise, proxies—and ultimately, all of us—pay the price of the errors that inevitably ensue.

Of course, this does not mean that we should give up on fighting terrorists. Counterterrorism policies could be directed through traditional military, law enforcement, and intelligence mechanisms. They could also be directed through new, specialized anti-terrorism agencies that operate differently than traditional civil regulators, much as specialized agencies like the Department of Defense execute conventional wars. Concerns regarding the ultimate value of the war on terrorism and the precise approach that these task-specific and rationalized government actors should take in their anti-terrorism initiatives are, however, beyond the scope of this Article.

Rather, we have focused on a different, narrower question: Should anti-terrorism measures be channeled through our ordinary administrative agencies? We think that, generally, the answer is no. Involving administrative agencies in this war serves only symbolic goals (and arguably not even those), and it does so at a substantial financial and social cost. The PATRIOT Act and REAL ID Act reforms cut against the cogent analysis of Weber, the legal process, and New Deal administrative law scholars, who urged delegation of authority to agencies only in accordance with their expertise and with an eye to balancing agency discretion with external oversight. They also contradict our basic notion of fit: that civil rules based in voluntary participation and compliance can best be used to regulate the law-abiding public rather than non-civil actors who will not hesitate to circumvent and thwart these systems.

But we cannot ignore reality: our government has left us no doubt that it views the war on terror as proceeding on all fronts, domestic and international, through the military, through law enforcement, and through

293. Press Release, U.S. Dep't of Homeland Security, Secretary Ridge Announces New Financial Investigation Initiatives (July 8, 2003), *available at* http://www.dhs.gov/xnews/releases/press-releases_0206.shtm.

294. 9/11 COMMISSION REPORT, *supra* note 112, at 81. Some cities, including New York, have traditionally refused to share information with the U.S. Citizenship and Immigration Services, formally the INS, on the immigration status of their citizenry. *Id.* at 475 n.46.

295. The federal government's Terrorist Information and Prevention System suggests novel uses of the federal Militia Clause power, including the new prospect of disciplining local counterparts that have refused to cooperate in the effort to quash terrorism. Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 472 (2003).

these ordinary agencies.[296] Realistically, therefore, we feel compelled to answer the "what then" question—what if, in spite of the concerns we have raised here, anti-terrorism measures will nonetheless be directed through administrative agencies, for reasons of political expediency, public demand, or symbolic significance? In our view, if anti-terrorism measures must be directed through administrative agencies, the least that we can do is to try to minimize the collateral damage such measures cause to our agencies, to proxies, and to the American people.

The most effective way of doing so would be to ensure that those measures are good policy anyway—that is, that they would be good policy even without the national security purpose that is catalyzing their immediate implementation. To meet the "good policy anyway" test, at a minimum, such measures should observe three principles: they should fit within the core competence of the agency, properly balance discretion with oversight, and perhaps most importantly, promote some end that furthers the agency's regulatory responsibilities.[297]

The drivers' license measures called for by the REAL ID Act provide a good example of how current anti-terrorism measures could be amended to be "good policy anyway." Whether an initiative promotes the agency's purpose should be considered according to two concerns: the substance of the provision and a cost-benefit analysis of the extent to which the provision promotes a core goal in light of the resources it directs away from other agency goals. Here, sharing databases of driver records and automobile registrations with other states enables DMVs to more accurately enforce driver and automobile safety across state lines. This measure also seems likely to promote this core agency goal efficiently, without redirecting too many resources from other agency initiatives, for it builds from and reinforces existing databases and ongoing synchronization efforts in the states.

In contrast, confirming social security numbers and immigration status are directly counterproductive measures that discourage some residents, particularly illegal immigrants, from participating in the licensing regime. Finally, because other measures aimed at making the cards difficult to forge, confirming identity, and reducing identity fraud promote the core goal of automobile and driver safety only indirectly, the effect such measures will have on DMVs' resources and functions is crucial: very inexpensive measures

296. Terrorism financing is "A Key Front in a Global War on Terror" as Treasury officials have testified to Congress, and the slogan warranted inclusion in the president's State of the Union address. Levey Testimony, *supra* note 217. Congressman James Sensenbrenner has declared that "[t]he Real ID [Act] is vital to preventing foreign terrorists from hiding in plain sight while conducting their operations and planning attacks." Dibya Sarkar, *REAL ID Zips Through Congress*, FCW.COM, May 11, 2005, http://www.fcw.com/article88832-05-11-05-Web.

297. These principles, of course, build on our previous discussion of the core administrative-law concepts of expertise and discretion. *See infra* Part II.A.

may nonetheless be worthwhile for their indirect effects, but very costly measures like maintaining databases of identity documents will probably direct too many resources away from the agency's core purposes.

It is perhaps not surprising that there seems to be a connection between the goals that are within the core purpose of the agency and the tasks that are within its expertise. Here, activities that undermine the DMV's purpose also tend to be outside its expertise, such as checking immigration documents and reviewing social security numbers, as well as checking and maintaining databases of identity documents. Once again, maintaining and sharing driver and automobile records form a notable exception, being well within the agency's area of expertise.

Ultimately, although the "good policy anyway" test provides a way for the government to implement some counterterrorism measures through our civil administrative systems, if it must, our view is that the civil bureaucracy is not the right place to center the war on terrorism. Instead, our administrative agencies should be left to manage the occasionally boring, but ultimately crucial, matters that they handle best.